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No. 91-194

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA,
by and through its Tax Commissioner,
HEIDI HEITKAMP,

Respondent.

On Writ of Certiorari to the
Supreme Court of the State of North Dakota

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the North Dakota Supreme Court is obligated to follow the longstanding precedent of *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), in a case that is factually indistinguishable from *Bellas Hess*?

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OPINIONS BELOW

The opinion of the Supreme Court of the State of North Dakota is reported at 470 N.W.2d 203 (1991), and is reprinted in the Appendix to the Petition for Writ of Certiorari (hereinafter referred to as "Pet. App.") A1-A36.

The Memorandum Opinion of Judge Graff of the District Court for the South Central Judicial District, County of Burleigh, State of North Dakota, was issued on May 15, 1990 (N. Dakota State Tax Reporter (CCH) ¶ 200-376) and is reprinted at Pet. App. A38-A42.

JURISDICTION

This action was brought by the State of North Dakota ("North Dakota") against Quill Corporation ("Quill")[1] for taxes alleged to be due under the North Dakota Sales and Use Tax Act, as amended (Sections 57-40.2-01(6) and (7), N.D. Cent. Code (Supp. 1989) and regulations promulgated thereunder. (N.D. Admin. Code § 81-04.1-01-03.1 (1987).) (Joint Appendix, "J.A." 3, 6.)

The Supreme Court of North Dakota entered judgment on May 7, 1991 and no rehearing was requested. Petitioner timely filed its Petition for Writ of Certiorari under 28 U.S.C. § 1257(a), invoking the jurisdiction of this Court to review the judgment of the North Dakota Supreme Court.

On October 7, 1991, this Court granted a writ of certiorari limited to Question 1 presented by the petition. (J.A. 52.)

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[1] Pursuant to Supreme Court Rule 29.1, the Court is advised that Quill is neither the parent nor the subsidiary of any other company.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional, statutory and regulatory provisions:

U.S. Const. art. I, § 8, cl. 3
U.S. Const. art. VI, ¶¶ 2 and 3
U.S. Const. amend. XIV, § 1
N.D. Cent. Code § 57-40.2-01(6) and (7) (Supp. 1989)
N.D. Admin. Code § 81-04.1-01-03.1 (1987)

The text of these provisions and related sections of the North Dakota Sales and Use Tax Acts are reproduced in Pet. App. A46-A57.

STATEMENT OF THE CASE

North Dakota enacted legislation which required Quill to register under the North Dakota Sales and Use Tax Act as a "retailer" maintaining a place of business in North Dakota and to obtain a North Dakota sales and use tax permit to collect and remit North Dakota use taxes on sales made by mail and telephone to North Dakota customers, even though Quill had no physical presence and conducted no local activity in North Dakota. (J.A. 3-7.)

The North Dakota Use Tax.

In 1987 North Dakota enacted legislation expanding the reach of the North Dakota sales/use tax laws to:

> every person who engages in regular or systematic solicitation of a consumer market in this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, or by means of print, radio or television media, by mail, telegraphy, telephone, computer data base, cable optic, microwave, or other communication system.[2]

North Dakota's Administrative Code § 81-04.1-01-03.1 defines the term "regular or systematic solicitation" to include three or more separate mailings of any advertisement during a specified twelve month period. (Pet. App. A56.) The 1987 statute requires any out-of-state vendor who satisfies this statutory definition to register as a "retailer" under the North Dakota sales/use tax acts, to obtain a North Dakota sales/use tax registration permit, and to be subject to North Dakota use tax collection obligations and all other regulatory provisions under the North Dakota sales and use tax acts including remitting the tax whether or not it is actually collected. These burdens are imposed even though the out-of-state vendor maintains no property and conducts no localized business activity within the state. (Pet. App. A47-A57.)[3]

Quill's Business.

Quill is a national mail order vendor selling office supplies, stationery and office equipment. Quill is incorporated in Delaware and maintains its principal place of business in Lincolnshire, Illinois. (J.A. 28.) Quill's only offices,

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[2] The definition of "retailer" under Section 57-40.2-01(6), N.D. Cent. Code (Supp. 1989) was amended in 1987. The definition of "[r]etailer maintaining a place of business in this state" was also amended to include substantially the same activities as defined above. N.D. Cent. Code § 57-40.2-01(7) (Supp. 1989) (Pet. App. A47-A48).

[3] Prior to 1987, the terms "retailer" and "retailer maintaining a place of business in [North Dakota]" were applied only to persons having a "physical presence" in the state such as an office, distribution house, sales house, warehouse, salesperson or agent. N.D. Cent. Code § 57-40.2-01(6) and (7) (prior to 1987 amendments). North Dakota did not require registration and did not impose use tax collection or payment obligations on out-of-state mail order vendors absent a physical presence in the state. (Pet. App. A58-A66.)

warehouses and employees are located in Illinois, California and Georgia. Quill is authorized to transact business only in those states. (J.A. 29.)

Quill solicits sales through catalogs and advertising flyers mailed to customers throughout the United States, including customers located in North Dakota. (J.A. 29.) Twice a year Quill mails catalogs from Illinois to a list of approximately 2,300 customers located in North Dakota. (R. 95.) During the year, Quill also mails out and encloses with merchandise smaller intermediate sales books and flyers. (R. 95.) Quill receives orders from customers by mail and telephone (including fax, telecopy, telex and electronic mail[4]) at its Illinois, California and Georgia locations. (J.A. 29.) All communications with customers in connection with their orders is conducted from Illinois, California and Georgia. (J.A. 29.) Quill ships merchandise to fill orders by United States mail or common carrier from locations outside North Dakota. (J.A. 29.)

Quill has no physical presence in North Dakota. Quill does not own any real or personal tangible property in North Dakota and does not maintain any office, distribution point, sales house, warehouse or other place of business in North Dakota. (J.A. 31.) Quill does not have any agent, salesman, employee, representative, independent contractor, canvasser, solicitor or other person of any kind soliciting sales or otherwise acting on its behalf in North Dakota. (J.A. 31.) Quill does not store inventory or merchandise in North Dakota and does not retain any security interest in merchandise sold to North Dakota customers. (J.A. 31.) Quill does not have any telephone listing, toll-free telephone line, "800" number or WATS line in North Dakota. (J.A. 32.) Quill does not have a bank account in North Dakota. (J.A. 30.) Quill does not advertise by radio

[4] Electronic mail is a term to describe computer communication via telephone.

or television media in North Dakota, nor does it advertise in newspapers distributed in North Dakota or on billboards located in the state. (J.A. 32.) Quill does not solicit by means of telegraphy, cable, optic, microwave, or similar communication system located in North Dakota. (J.A. 32.)

Proceedings Below.

North Dakota filed this action on July 7, 1989 and requested that the court: (i) declare Quill a "retailer maintaining a place of business in [North Dakota]"; (ii) "require Quill to obtain a North Dakota sales and use tax permit"; and (iii) order Quill to pay all North Dakota use taxes (plus interest and penalties) due from July 1, 1987. (J.A. 5-6.) Quill defended against this action on the grounds that it violated the due process and commerce clauses of the U.S. Constitution as established by this Court's decision in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967). Quill also sought reimbursement of attorneys' fees and costs pursuant to 42 U.S.C. §§ 1983 and 1988.

On cross-motions for summary judgment, the district court held for Quill. (Pet. App. A38.) The court declared that the 1987 amendments to the North Dakota Tax Law, Sections 57-40.2-01(6) and (7), violated the due process and commerce clauses of the United States Constitution and declared those amendments invalid as applied to Quill. (Pet. App. A42.) The district court found that Quill's contacts with North Dakota were factually indistinguishable from the contacts of the mail order company addressed by this Court in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967). (Pet. App. A40.) The district judge specifically emphasized that the state failed to present any facts that demonstrated that Quill benefited from protection of the local government. (Pet. App. A41.) Without analysis, the court denied Quill's re-

quest for reimbursement of attorneys' fees and costs pursuant to 42 U.S.C. §§ 1983 and 1988. (Pet. App. A42.)

The state appealed to the North Dakota Supreme Court which reversed.[5] The supreme court refused to follow the constitutional standards established in *Bellas Hess*. It concluded that those standards were "obsolescent precedent." (*Quill*, Pet. App. A10.) The court also concluded that the existence of an organized market for Quill's products in North Dakota satisfied the nexus considerations in this case. (*Quill*, Pet. App. A8, A25.) The North Dakota Supreme Court held Quill liable for North Dakota use taxes on sales made by Quill into North Dakota commencing July 1, 1987. (Pet. App. A36, A37.) Request for this Court's review followed.

SUMMARY OF THE ARGUMENT

The great purpose of the commerce clause is to promote and protect an area of free trade among the states. A key element of the protection given to the national economy by the commerce clause is the prohibition of state taxation on activities insufficiently related to the state. The decisions of this Court under the commerce and due process clauses have established and repeatedly recognized that a state cannot impose tax obligations on an out-of-state vendor unless the vendor has a "substantial nexus" with the taxing jurisdiction. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977); *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 756, 758 (1967).

[5] Quill cross-appealed that portion of the final judgment whereby the district court dismissed Quill's counterclaim for reimbursement of attorneys' fees and other costs under 42 U.S.C. §§ 1983 and 1988.

When determining whether there is sufficient "nexus" to require an out-of-state vendor to collect state taxes, this Court has weighed the resulting burden on the vendor against the extent of the vendor's contacts, if any, with the taxing state. The controlling question has been whether the tax obligations sought to be imposed have a proper relation to the benefits of local government conferred upon the out-of-state vendor by the taxing state. (*Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940); *Complete Auto Transit*, 430 U.S. 274.) To require out-of-state vendors, who do no more than communicate with customers by mail or common carrier, to collect sales and use taxes owed by customers in numerous states would subject those vendors to fundamentally unfair burdens obstructing interstate commerce. *Bellas Hess*, 386 U.S. 753 (1967).

For nearly twenty-five years, this Court's leading decision defining nexus required in the context of collecting state use taxes on interstate mail order sales has been *Bellas Hess*. There, this Court ruled that states could not impose use tax collection and payment obligations on out-of-state mail order vendors who maintained no physical presence within the taxing state. 386 U.S. at 758. This Court found the requirement of physical presence to rest upon principles essential to the overriding national policy of preserving open interstate markets. 386 U.S. at 759-60. The Court reasoned that without a clear workable standard, companies such as mail order vendors would be subject to state tax obligations based on an uncertain standard of whether the mail order company "regularly and continuously engaged in the 'exploitation of the consumer market' " in the state. 386 U.S. at 762 (Fortas, J., dissenting). Without a clear standard, out-of-state vendors who owned no property and conducted no local activities in the taxing state, would be subject to a "virtual welter of complicated obligations to local jurisdictions" which

would impose unjustifiable local burdens on interstate commerce. 386 U.S. at 759-60.

Bellas Hess followed a line of decisions that for over twenty-five years required physical presence within a state before tax obligations could be imposed. This principle, followed in *Bellas Hess* and its progeny, has been imbedded in business and state tax administrative practices and has been a workable standard for twenty-five years.

In 1987 North Dakota urged Congress to enact federal legislation to permit North Dakota and other states to impose sales and use taxes on mail order sales in certain situations. (Pet. App. A58.) Simultaneous with its petition to Congress, North Dakota enacted state legislation that would enable it to collect taxes if permitted by Congress. (Pet. App. A47, A56, A60.) Congress considered but never enacted federal legislation to authorize the states to tax out-of-state vendors who did not conduct a local business or maintain property in the taxing state. The strong congressional reluctance to expand the states' taxing powers was and continues to be based on the conflict between: (i) the constitutional need to eliminate cumulative, substantial and discriminatory burdens on the interstate business of out-of-state mail order vendors, and (ii) the state and local governments' inability to get together to eliminate those burdens.

The statute and regulations enacted by North Dakota in 1987 require every out-of-state vendor who mails three or more advertisements into North Dakota during a twelve-month period to register as a "*retailer maintaining a place of business*" in North Dakota and be subject to all provisions of North Dakota law applicable to local vendors operating local establishments within the state. The North Dakota statute ignores *Bellas Hess* and the constitutional principle that a state may not impose tax burdens on an out-of-state business unless that business has

a local presence in the state to justify sharing the costs of government.

The North Dakota Supreme Court upheld the constitutionality of the North Dakota use tax law as applied to *Quill*, even though the lower court concluded that Quill did not meet the *Bellas Hess* "physical presence" test. (Pet. App. A40.) The Supreme Court explicitly based its decision on its conclusion that *Bellas Hess* is "obsolescent precedent." (Pet. App. A10.) The court opined that "the foundational basis of *Bellas Hess* has been eroded and that the Supreme Court would so conclude." (Pet. App. A13.)

The North Dakota Supreme Court cited no decision of this Court questioning the continued validity of *Bellas Hess*. Instead, the court followed Justice Fortas' dissenting opinion in *Bellas Hess*, labeling it the "ubiquitous presence" test. (Pet. App. A8, A29.) The court advanced no new analysis to justify its refusal to follow this Court's precedent. The facts relied upon by the court below do not bear upon the constitutional protections afforded by the commerce and due process clauses. The North Dakota Supreme Court ignores fifty years of jurisprudence and misapplies this Court's holding in *Complete Auto Transit*. The court also ignores the tremendous burdens that will be imposed upon mail order vendors if the "business presence" standard is abandoned for an amorphous "ubiquitous presence" test.

Adoption of North Dakota's test on a nationwide basis will expose all mail order vendors to economic chaos, especially if states are allowed retroactively to apply this new standard to vendors who cannot collect use taxes on prior sales. This Court should not countenance the weakening of constitutional protections of interstate commerce. Reliance upon the existing standard set forth in *Bellas Hess* has afforded a workable rule for more than twenty-five years. Any realignment of commerce clause applications is more suitably undertaken by Congress.

ARGUMENT

I. THE NORTH DAKOTA SUPREME COURT ERRONEOUSLY REFUSED TO APPLY *BELLAS HESS* IN A CASE THAT IS FACTUALLY INDISTINGUISHABLE.

This case presents the question whether the North Dakota Supreme Court was justified in refusing to apply the "physical presence" standard articulated in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967).

A. The Fundamental Purpose of the Commerce Clause is to Promote and Protect an Area of Free Trade.

A primary effect of the commerce and due process clauses has been to secure a unified, national market unimpeded by state-imposed burdens and restraints against trade across state lines. It has long been recognized by this Court that the fundamental purpose of the commerce clause was to promote and protect an area of free trade among the several states. In *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977), this Court said:

> As in *Great A&P Tea Co. v. Cottrell*, 424 U.S. 366 (1976), we begin with the principle that "[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States." *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944). It is now established beyond dispute that "the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States.

Boston Stock Exchange, 429 U.S. at 328.

In *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987), this Court described free interstate trade as the "central" purpose of the commerce clause. 483 U.S.

at 280. Of all of this Court's statements regarding the commerce clause, Justice Jackson's is perhaps the most eloquent. In *H.P. Hood & Sons v. Dumond*, 336 U.S. 525 (1949), he stated:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

Hood & Sons, 336 U.S. at 539.

A key element of the protection given to the national economy by the commerce clause is the prohibition of state tax on activities insufficiently related to the taxing state. The decisions of this Court under the due process and commerce clauses have established and repeatedly recognized that a state cannot impose tax obligations on an out-of-state vendor unless the vendor has a "substantial nexus" with that taxing state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). In *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981), this Court explained:

> [I]nterstate business must have a substantial nexus with the State before *any* tax may be levied on it. See *National Bellas Hess, Inc. v. Illinois Revenue Dept.*, 386 U.S. 753 (1967).

Quoting *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938), the Court also stated:

> [t]he measure of tax must be reasonably related to the extent of the contact, *since it is the activities or presence of the taxpayer in the State* that may prop-

> erly be made to bear a "just share of state tax burden."

Commonwealth Edison Co. v. Montana, 453 U.S. at 626 (Emphasis added).

For nearly a quarter of a century, this Court's leading decision defining the required nexus in the context of mail order sales has been *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967). There, this Court ruled that states could not impose use tax collection and payment obligations on out-of-state mail order vendors that maintained no physical presence within the taxing state:

> In order to uphold the power of Illinois to impose use tax burdens on National [Bellas Hess] in this case, we would have to repudiate totally the sharp distinction which these and other decisions have drawn between mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business. But this basic distinction, which until now has been generally recognized by the state taxing authorities, is a valid one, and we decline to obliterate it.

Bellas Hess, 386 U.S. at 758.

The court found the requirement of physical presence to rest upon principles essential to the overriding national policy of preserving open interstate markets. The Court reasoned that, without this distinction, companies such as mail order sellers would be subject to a "virtual welter of complicated obligations to local jurisdictions" which would impose "unjustifiable local entanglements" on interstate commerce. *Bellas Hess*, 386 U.S. at 759-60.

Recently, in *Dennis v. Higgins*, 111 S. Ct. 865 (1991), this Court recognized that the right of merchants to engage in interstate trade free of such "local entanglements"

is a "right" and "privilege" secured by the Constitution. The Court said:

> The Court has often described the Commerce Clause as conferring a "right" to engage in interstate trade free from restrictive state regulation. In *Crutcher v. Kentucky*, 141 U.S. 47 (1891), in which the Court struck down a license requirement imposed on certain out-of-state companies, the Court stated: "To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States." Id., at 57. Similarly, *Western Union Telegraph Co. v. Kansas ex rel. Coleman*, 216 U.S. 1, 25 (1910), referred to "the substantial rights of those engaged in interstate commerce." And *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967), declared that engaging in interstate commerce is a "righ[t] of constitutional stature."

Dennis v. Higgins, 111 S. Ct. at 871 (1991).

It is the right to market its goods in the fifty states which Quill defends in this case.

Marketing consists initially of making the market aware of a merchant's products. In this case, marketing involves the use of catalogs directed to customers by the U.S. mail. North Dakota urges this Court to concede that *any* method regularly used to advertise and market goods to citizens within a state supports a finding of nexus, subjecting the out-of-state vendor to a host of tax and regulatory provisions under state law. (*Quill*, Pet. App. A29.) North Dakota would extend its tax laws to:

> every person who engages in regular or systematic solicitation of a consumer market in this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, or by means of print, radio or television media, by mail, telegraphy, telephone, computer data base, cable optic, microwave, or other communication system.

Section 57-40.2-01(6), N.D. Cent. Code (Supp. 1989). *See also* Section 57-40.2-01(7), N.D. Cent. Code (Supp. 1989) (Pet. App. A47-A48.)

B. North Dakota's Holding is Contrary to Fifty Years of Jurisprudence Interpreting the Commerce and Due Process Clauses.

The consequences of North Dakota's argument are dramatic. It eviscerates both the first and fourth prongs of the *Complete Auto Transit* test (*Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), discussed *infra*, pp. 29-30). It also overturns the precedents of this Court established during the last fifty years, precedents which mandate a physical presence to support a finding of tax nexus. *See infra* pp. 27-32.

Local marketing activities conducted by vendors with a physical presence (retail outlets and sales personnel) in a state, clearly invoke the taxing power exercised by that state because that physical presence within the state "bears fiscal relationship to protection, opportunities and benefits given by the state" to those vendors. *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940). Out-of-state vendors who merely send advertising into interstate markets, whose sole connection with the state is through common carrier and United States mail, do not bear a similar relationship with the state or derive the same benefits as do local retailers with a physical presence in the state. As noted by this Court, "it is difficult to conceive of commercial transactions more exclusively interstate in character" than mail order transactions that justify protection from state tax obligations. *Bellas Hess*, 386 U.S. at 759-60; *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 347 (1954).

Jurisdiction to Tax Requires Physical Presence in the Taxing State

In each of the tax decisions culminating with *Bellas Hess*, tax nexus was found to exist only when physical presence in the taxing jurisdiction was established. These decisions have consistently identified the significant difference between vendors which maintain outlets, property, salesmen or representatives within a state and out-of-state vendors whose communications and contacts with customers are limited to mail, telephone and common carrier conducted in an interstate business.

In 1941 this Court required the mail order operations of Sears, Roebuck & Co. to collect use tax on sales to local customers because Sears maintained local retail stores conducting a related business in the taxing state. Stressing the importance of the local retail outlets which enjoyed the protection and services of the taxing state, this Court said:

> Since Iowa has extended to it that privilege, Iowa can exact this burden [of collecting the use tax] as a price of enjoying the full benefits flowing from its Iowa business.

Nelson v. Sears, 312 U.S. 359, 364 (1941) (Bracketed material added).

The Court then contrasted the benefits given retailers with a physical presence to those who have none:

> But those other concerns [exclusively out-of-state mail order vendors] are not doing business in the state as foreign corporations. Hence, unlike respondent [Sears] they are not receiving benefits from Iowa for which it has the power to exact a price.

Nelson v. Sears, 312 U.S. at 365 (Bracketed material added.)[6]

[6] This Court has never modified this basic principle that jurisdiction to tax requires some presence—in person or through tangi-

(Footnote continued on following page)

In 1954 this Court specifically rejected Maryland's effort to predicate jurisdiction to compel an out-of-state vendor to collect local use tax upon a finding of regular, continuous advertising, when the vendor maintained no local stores or local solicitors within the state. Miller Brothers maintained a Delaware furniture store and advertised its merchandise almost daily in newspapers and over radio stations which consistently reached Maryland customers. *Miller Bros.*, 347 U.S. at 349 (1954). Miller Brothers also mailed advertising flyers to Maryland customers four times a year, regularly sold furniture to Maryland customers for use in Maryland and made regular deliveries into Maryland using its own trucks driven by its own employees. This Court held that in the absence of a physical presence in Maryland, Miller Brothers could not constitutionally be required to collect the Maryland use tax on its sales. The *Miller Bros.* decision gave effect to the Court's earlier statement in *Sears* that out-of-state mail order vendors could not be required to collect state use taxes when the

[6] *continued*
ble property or representatives—within the taxing state. In *General Trading Co. v. State Tax Com.*, 322 U.S. 335 (1944) and *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960), the Court sustained imposition of tax liability where sales were solicited by employees and by independent contractors within the taxing state. In these cases, the Court emphasized the importance of the "local function of solicitation" and upheld the tax obligation because of the physical presence of sales representatives carrying on the vendor's business within the state. *Scripto*, 362 U.S. at 211. *See also Nelson v. Montgomery Ward & Co.*, 312 U.S. 373, 375 (1941) (local retail outlets located in state); *General Trading Co. v. State Tax Com.*, 322 U.S. 335, 337 (1944) (local agents located in state); *Standard Pressed Steel Co. v. Washington*, 419 U.S. 560, 561-62 (1975) and *Tyler Pipe Industries, Inc. v. Washington*, 483 U.S. 232, 249 (1987) (employees and representatives located in state); *National Geographic Society v. California*, 430 U.S. 551, 556 (1977) (offices and employees located in state); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 276 (1977); and *Good's Furniture House, Inc. v. Iowa State Board of Tax*, 382 N.W.2d 145, 146-47 (Iowa), *cert. denied*, 479 U.S. 817 (1986) (in both cases trucks and employees located in state).

vendors had neither outlets nor solicitors within the taxing state, even though the vendors regularly solicited orders through the interstate dissemination of general advertising.

Bellas Hess

Thirteen years later in *Bellas Hess*, this Court reviewed Illinois' effort to avoid the nexus standard applied in *Miller Bros.* Illinois argued that it could require use tax collection by an out-of-state vendor whose contacts with Illinois consisted primarily of the regular and systematic mailing of catalogs and advertising flyers to Illinois residents and the regular delivery of ordered goods via mail or common carrier. It failed. *Bellas Hess*, 386 U.S. at 754-55, 758. Bellas Hess owned no tangible property, real or personal, in Illinois. It did, however, conduct a sizeable mail order operation (approximately $60 million in total annual sales) with a significant level of both sales and advertising in Illinois.[7] Considering whether the activities of Bellas Hess were sufficient to support Illinois' claims of nexus (to support imposition of tax collection duties), this Court again analyzed the applicable commerce and

[7] Bellas Hess sold approximately $2.1 million of merchandise into Illinois over a 15-month period, mailed semi-annual catalogs listing over 4,000 products to over 5 million customers, and sent advertising flyers to an even larger list of customers. *Bellas Hess*, 386 U.S. at 761. (Fortas, J., dissenting.) Bellas Hess sold a substantial part of its merchandise on credit payment plans, accepted checks drawn on Illinois banks, and sold goods C.O.D. *Id.* The company provided merchandise guarantees to its customers, allowing returns, exchanges or refunds. It solicited names of potential new customers from existing customers and accepted orders by telephone. *Bellas Hess*, 386 U.S. at 761 n.2; Affidavit of Thomas J. Curry, J.A. 49-50. *See* National Bellas Hess 1967 Catalog, Spring and Summer ed., *Bellas Hess*, Record on Appeal (O.T. 1966, No. 241); National Bellas Hess Spring 1970 catalog, reproduced in the *Quill* Record on Appeal Ex. I-2 (separately bound).

due process clause considerations.[8] It again concluded that when a vendor's only contacts with a state are by mail and common carrier, the state has no basis to require the vendor to collect use tax on mail order sales made to that state's residents and Illinois' efforts violated both the due process clause of the fourteenth amendment and the commerce clause.

In *Bellas Hess*, this Court applied an established and ascertainable tax nexus test that keyed on whether a vendor maintains a physical presence (retail outlets, solicitors or property) within the taxing state. The Court reviewed over twenty-five years of jurisprudence and observed:

> But the Court has *never* held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail.

Bellas Hess, 386 U.S. at 758. (Emphasis added.)

The Court considered and rejected Illinois' argument that maintenance of an economic marketplace justified the imposition of tax collection obligations. Justice Fortas' dissenting opinion, considered by the North Dakota court as prescient (*Quill*, Pet. App. A8), urged this Court to abolish the "physical presence" test. (386 U.S. at 762.) Justice Fortas was persuaded that the political structure inherent in the marketplace, when combined with successful marketing, created an obligation upon a vendor to collect tax without regard to its physical presence in the political (taxing) jurisdiction. This same argument has now been adopted and labeled by the North Dakota court as its "ubiquitous presence" test. (*Quill*, Pet. App. A29.)

[8] Tax nexus criteria under the due process and commerce clauses are similar. *Bellas Hess*, 386 U.S. at 756; *Trinova Corp. v. Mich. Dept. of Treasury*, 111 S. Ct. 818, 828-29 (1991). Due process requires that there be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax," *Bellas Hess*, 386 U.S. at 756, and the commerce clause requires that the tax "[be] applied to an activity with a substantial nexus with the taxing State, . . . not discriminate against interstate commerce, and [be] fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

In reviewing the expansive application of the Illinois law advocated by the state in *Bellas Hess*, this Court recognized that the statute would impose tax collection liabilities on all regular advertisers without regard to the magnitude of their sales activity. The argument advanced by Illinois counsel (but rejected by this Court) in *Bellas Hess* demonstrates that the test Illinois sought to impose was the same test articulated in Justice Fortas' dissenting opinion and is the same test that the North Dakota court here labels as the "ubiquitous presence" test:

> [T]he rule that I would suggest should be distilled from the cases of this Court is a rule which businessmen should well understand, and that is simply when a business is successfully in a state from a business point of view that that should be equated with presence from a legal point of view.

Transcript of Oral Argument, p. 33, *Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967) (O.T. 1966 No. 241), reproduced in Appendix 1 to Petitioner's Brief.

The standard espoused by Illinois and subsequently embraced by Justice Fortas and the North Dakota Supreme Court is not functional and in reality provides no test at all. It renders nugatory the commerce clause and due process protections heretofore established by this Court and would reverse the decision of this Court in *Bellas Hess*.

Quill is Factually Indistinguishable from Bellas Hess

Quill and *Bellas Hess* have a unique likeness on the level of sales,[9] on the level of advertising flyers,[10] and on commercial law applications.[11] The North Dakota District Court Judge found that Quill's relationship to North Dakota was "very similar" to the relationship of Bellas Hess to Illinois. (Pet. App. A40.)

North Dakota's "Ubiquitous Presence" Test

The North Dakota Supreme Court also acknowledged that *Bellas Hess* was directly on point. (*Quill*, Pet. App. A5.) However, its finding of jurisdiction to tax Quill rested upon its determination that application of the commerce and due process clauses now allows a "ubiquitous presence" analysis (rather than a "physical presence" analysis) when ascertaining taxable nexus. The court below argued

[9] In fact, more sales were at issue in *Bellas Hess* than in *Quill*. Bellas Hess' sales to Illinois residents in the *fifteen-month period* at issue in that case totalled $2,174,744. *Bellas Hess*, 386 U.S. at 761 (Fortas, J., dissenting). Quill's sales to North Dakota residents in the *twenty-four month period* involved in this litigation totalled $1,849,305. (R. 92.) Thus Quill's annual sales were approximately half of Bellas Hess' annual sales. To allow for inflation, if Bellas Hess' annual 1961 Illinois sales are converted to 1989 dollars (using the Consumer Price Index), Bellas Hess would have sold approximately $9 million into Illinois, more than nine times the amount of Quill's annual sales into North Dakota. (R. 282-283.)

[10] More advertising flyers were mailed by Bellas Hess into Illinois than Quill mailed into North Dakota. Bellas Hess mailed to its customers over 5 million semi-annual catalogs listing over 4,000 products. Bellas Hess also mailed a substantially larger number of advertising flyers to customers. If Bellas Hess catalogs were distributed on the same ratio as its sales, the company would have mailed in excess of 289,000 catalogs to Illinois customers annually, not counting advertising flyers mailed separately and catalogs included with customer orders. (Compare R. 281 with R. 95.)

[11] Bellas Hess offered "charge account" services, shipped merchandise C.O.D. and sold merchandise with guarantees of customer satisfaction. *Bellas Hess*, 386 U.S. at 761. (J.A. 49.)

that "the foundational basis of *Bellas Hess* had been eroded" (*Quill*, Pet. App. A13); it then adopted as the basis for its opinion a "ubiquitous presence" test, incorporating the test articulated by Justice Fortas in his dissent in the *Bellas Hess* case. The court below stated:

> We conclude that Quill's asserted lack of physical presence is not fatal to the State's attempt to require Quill to collect and remit use tax on its sales into North Dakota . . . [W]e conclude that the concept of nexus encompasses more than mere physical presence within the state . . .

(*Quill*, Pet. App. A25.)

More precisely stated, the court concludes that the concept of nexus encompasses *less* than "physical presence." In support, the court enlists reference to the "tremendous social, economic, commercial and legal innovations" that have occurred during the intervening years since 1967. (*Quill*, Pet. App. A8, A10.) However, the North Dakota Supreme Court fails to explain how these "tremendous" innovations impact upon this Court's constitutional analysis in *Bellas Hess*. The court below looks at the same "benefits" considered by this Court in 1967, but in the context of communication technology in the 1990s. The court recites Quill's activities in a context that demonstrates a more efficient marketplace exists today than in 1967, but the court fails to identify how that efficiency obligates Quill to collect North Dakota use taxes:

> Quill's activities directed toward North Dakota consumers clearly establish a substantial [ubiquitous] "presence" within the State. To iterate Quill's activities, it has 3,500 active customers in North Dakota, and its annual sales of nearly $1,000,000 make it the sixth largest seller of office supplies in the State. It annually mails over 60 different catalogs and flyers to its North Dakota customers, accounting for 230,000 separate pieces of mail. Quill also has a "help line" for consumers to call if they have questions or prob-

> lems with merchandise ordered from Quill, and specialized service representatives are available [in Illinois] to assist with custom printing orders or to answer questions about computers available from Quill. Quill has availed itself of modern technology to engage in an extensive, continuous, and intentional solicitation and exploitation of the State's consumer market and had thereby established an *ubiquitous presence* in the State.

(*Quill*, Pet. App. A29); compare with *Bellas Hess*, 386 U.S. at 760-63. (Emphasis and bracketed material added.)

The dispute is not with Quill's activities, but with the court's substitution of a "ubiquitous presence" test[12] for this Court's "physical presence" test. Use of the "ubiquitous presence" test to establish tax nexus is both unsupportable and inapposite under constitutional precedent interpreting commerce and due process clause protections afforded out-of-state firms conducting a general interstate business. The 1987 amendments to the North Dakota tax law and the North Dakota Supreme Court's "ubiquitous presence" test impose North Dakota tax liability upon any vendor or advertiser making more than three solicitations per year, without regard to the magnitude of the market or the amount of merchandise sold.

The arguments urged by the North Dakota Supreme Court were considered and rejected by this Court in *Bellas Hess*, 386 U.S. at 760-762 (Fortas, J., dissenting). This Court reviewed the factual predicates needed for tax nexus and unequivocally rejected Justice Fortas' argument that

[12] Presumably the court was referring to the commonly understood meaning of the term "ubiquitous," that is "existing or being everywhere at the same time." Webster's Third New International Dictionary, Unabridged (1981), Merriam-Webster. Black's Law Dictionary defines the term "ubiquity" in a similar manner: "omnipresence; presence in several places, or in all places, at one time." Black's Law Dictionary (6th ed. 1990).

economic benefits derived through "systematic, continuous solicitation and exploitation" of a state's market (i.e., a "ubiquitous" presence without physical presence) satisfied the constitutional requirements for tax nexus. *Bellas Hess*, 386 U.S. at 758.

North Dakota provides no new insights to justify adoption of this amorphous "ubiquitous presence" test previously repudiated in *Bellas Hess*. The North Dakota Court merely refocuses the arguments rejected in *Bellas Hess* by pointing to: (i) the increased size of the industry (which the North Dakota court found to be "the greatest change in mail order since 1967") (*Quill*, Pet. App. A12); (ii) the new technology for ordering goods including "toll-free telephone lines, fax orders, and direct computer ordering" and the new methods for delivering merchandise, including "advances in the parcel delivery industry . . . including overnight delivery" (*Quill*, Pet. App. A12); and (iii) the service of North Dakota in disposing of the "solid waste" created by catalogs sent to North Dakota residents. (*Quill*, Pet. App. A34.)

The Size of the Mail Order Industry is not Constitutionally Significant

The court below observes that during the quarter-century which has passed since *Bellas Hess*, " 'mail order' has grown from a relatively inconsequential market niche into a goliath."[13] (*Quill*, Pet. App. A11.) The court makes no effort to, nor can it, explain how the volume of sales of the mail order industry has any relevance to whether

[13] Contrary to the speculations of the court below, this Court was fully aware that the sizable number of mail order sales at issue in *Bellas Hess* in 1967 would increase in the coming years (*Bellas Hess*, 386 U.S. at 764), but the potential magnitude of that future growth did not impact this Court's constitutional analysis.

Quill has nexus to North Dakota.[14] Neither the size of the market nor the percentage of market penetration is of constitutional significance. It is the physical nexus of the vendor to the market state which determine tax burdens. 386 U.S. at 758. If the North Dakota ruling is affirmed, every company whose activities are limited to solicitation, without actual physical presence, will lose the constitutional protections heretofore afforded, regardless of their size.

In sum, the North Dakota court has in this case decided that any successful mail order vendor will be required to collect a tax for North Dakota without regard to any other activity occurring in the state, other than the fact that there has been solicitation and sales. This holding has given an entirely new, unprecedented and unsupported meaning to both the commerce and due process clauses of the Constitution.

New Technology Does Not Support Abandonment of Accepted Constitutional Criteria

Without meaningful analysis the North Dakota Supreme Court also urges that technological advances in communications in the last two decades support the abandonment of accepted constitutional criteria. The economic market

[14] The North Dakota court's emphasis on the "sheer volume" of mail order sales ignores the fact that *Bellas Hess* sold nearly twice as much merchandise into Illinois than Quill sold into North Dakota. See note 9 *supra*. The court also ignores the fact that more than 94% of mail order firms have annual sales of less than $12.5 million. *Collection of State Sales and Use Taxes by Out-of-State Vendors: Hearing on S.639 and S.1099 for the Subcomm. on Taxation and Debt Mgmt. of the Senate Comm. on Finance*, 100th Cong., 1st Sess. (1987), 15-16 (testimony of Governor George Sinner of North Dakota). Direct Marketing Association, the largest trade association representing mail order businesses, reports that 85% of its 3500 members have annual national sales of less than $10 million; 62% report annual sales of less than $3 million. (Brief of Amicus Curiae Direct Marketing Association at 1.)

(the existing national marketplace) is obviously larger in 1991 than it was in 1967. There have been and will continue to be significant improvements in communication capabilities among the vendors and vendees who comprise the marketplace. But draftsmen of the constitution had the foresight to appreciate that those markets should remain accessible and unencumbered in order to foster the economic well-being of all citizens, regardless of the technology used. The maintenance of a geographical market (e.g., North Dakota residents) has never been perceived as a governmental service sufficient to justify the imposition of a tax. *H.P. Hood & Sons v. Dumond*, 336 U.S. 525, 539 (1949); *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 759-60 (1967); *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 328 (1977).

In the mail order business, markets exist wherever residents reside. Given the nature of our inherent political structure, residents reside in a state. Given the need to finance state governments, states levy taxes on residents and on non-residents who have some connection ("physical presence/nexus") with the state. But non-residents are otherwise protected from taxation by the many states under both the commerce and due process clauses to the constitution unless they physically enter the taxing jurisdiction. *Bellas Hess*, 386 U.S. at 758 (1967); *Miller Bros.*, 347 U.S. at 347 (1954); *Sears*, 312 U.S. at 364 (1941). This Court has never held that constitutional protections historically afforded are dependent upon the efficiencies of the vendor.[15]

The statute that the North Dakota court upheld permits North Dakota to tax any mail order vendor without regard to whether the vendor takes advantage of the technological advances of the past thirty years. North Dakota would deny the commerce clause and due process protec-

[15] *See, e.g., Hunt v. Washington*, 432 U.S. 333, 351 (1977).

tions to all vendors who market in that state by mail or common carrier. The court's argument that telephonic and related communication improvements have rendered this Court's decision in *Bellas Hess* "obsolescent precedent" (*Quill*, Pet. App. A10) has overwhelming significance when considered in the context of existing and anticipated technological changes.

North Dakota's Reliance Upon Waste Disposal To Establish Tax Nexus Is Misplaced

The North Dakota Supreme Court also urges that Quill should be obligated to collect North Dakota use tax because (i) Quill mails catalogs into North Dakota, and (ii) catalogs ultimately may be disposed of in landfills located in North Dakota. (*Quill*, Pet. App. A34.) While the level of awareness of environmental concerns has increased, the argument of the court below precisely follows Illinois' attempt to establish nexus in *Bellas Hess*. In 1967 Illinois argued before this Court that Bellas Hess' "catalogs and advertising flyers . . . are found within the State" and, thus, support a finding of nexus with Illinois to require collection of Illinois use tax on merchandise sold to Illinois customers.[16] This Court rejected that argument, pointing out that mere "communicat[ion] with customers in the State by mail or common carrier as part of a general interstate business" does not establish the necessary physical presence for imposition of use tax collection obligations. *Bellas Hess*, 386 U.S. at 758. Catalogs sent by Bellas Hess into Illinois obviously ended up in Illinois landfills, but this Court did not find that fact to be constitutionally significant.[17] The North Dakota court fails to address the issue

[16] Brief for Appellee at 15-16, *Bellas Hess*, 386 U.S. 753 (O.T. 1966, No. 241).

[17] In fact, more catalogs and advertising flyers were mailed annually by Bellas Hess into Illinois than Quill mailed annually into North Dakota. *See* note 10, *supra*.

of how this fact now obtains greater significance in the context of North Dakota. The argument of the North Dakota court adds nothing new to the issue previously considered by this Court in *Bellas Hess*.[18]

The Law Has Not Changed; This Court Has Consistently Applied the Holding in Bellas Hess

In *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), Justice Clark reviewed this Court's prior decisions regarding unconstitutional state taxes. While conceding that those decisions were sometimes confusing and inconsistent he stated: "From the quagmire there emerge, however, some firm peaks of decision which remain unquestioned." 358 U.S. at 458. For the last quarter century, this Court's decision in *Bellas Hess* has been one of those "firm peaks of decision".[19]

This Court has consistently applied *Bellas Hess* and has never held that communicating with customers by mail or telephone is sufficient to provide tax nexus. Contrary to the North Dakota Supreme Court's suggestion (*Quill*, Pet. App. A15-A16), this Court did not abandon the nexus standard set forth in *Bellas Hess* when deciding *National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551 (1977). In *National Geographic*, the vendor maintained two offices and up to eight employees in California to solicit advertising for its magazine. *National Geo-*

[18] *See also SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666, 671 (1991), *cert. denied*, 111 S. Ct. 2839 (1991); and *Wisconsin v. J.C. Penney*, 323 N.W.2d 168, 170 (Wisc. App. 1982); *Mart Realty, Inc. v. Norberg*, 303 A.2d 361, 363 (RI 1973); *Hoffman-LaRoche, Inc. v. Porterfield*, 243 N.E.2d 72, 75 (Ohio 1968) (all holding that advertising material, once mailed, becomes the property of the recipient).

[19] *Bellas Hess* has been cited by this Court and by lower state and federal courts in approximately 75 cases decided over the last quarter-century. *See* Pet. App. A76 and Appendix 4.

graphic, 430 U.S. at 552, 555-56; 547 P.2d at 458, 459 (Cal. 1976). National Geographic also operated a mail order business from its facilities located in the District of Columbia and Maryland. California sought to require National Geographic to collect use tax from mail order sales of merchandise to California residents. The California Supreme Court agreed and stated:

> Where an out-of-state seller conducts a substantial mail order business with residents of a state . . . the *slightest presence* within such taxing state independent of any connection through interstate commerce will permit the state constitutionally to impose on the seller the duty of collecting the use tax from such mail order purchasers and the liability for failure to do so.

National Geographic, 430 U.S. at 555-56 quoting *National Geographic*, 547 P.2d 458, 462 (Cal. 1976) (Emphasis added by the Court).

While upholding California's claim, this Court specifically rejected California's "slightest presence" test, stating:

> [N]ot every out-of-state seller may constitutionally be made liable for payment of the use tax on merchandise sold to purchasers in the [taxing] State.

National Geographic, 430 U.S. at 555.

> Our affirmance of the California Supreme court is not to be understood as implying agreement with that court's "slightest presence" standard of Constitutional nexus . . . Our affirmance . . . rests upon our conclusion that appellant's maintenance of the two offices in California and activities there adequately establish a relationship or "nexus" between the Society and the State . . .

National Geographic, 430 U.S. at 556.

As in *Bellas Hess*, this Court focused on the physical presence of National Geographic in California, not the "economic benefits" derived from the state or the "slightest presence" theory advanced by the California court. *National Geographic*, 430 U.S. at 556-57. This is emphasized by the Court's reiteration in *National Geographic* of the holding in *Bellas Hess*:

> The Court's opinion [in *Bellas Hess*] carefully underscored, however, the 'sharp distinction . . . between mail order sellers with retail outlets, solicitors, or property within [the taxing] State and those like National [Bellas Hess] who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business. *Id.* at 758. *Appellant [National Geographic] Society clearly falls into the former category.*

National Geographic, 430 U.S. at 559 (emphasis added).

The North Dakota Supreme Court's contention that *Bellas Hess* was eroded by *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), is also wrong. (*Quill*, Pet. App. A13-A14.) The court correctly recognized that *Complete Auto* sets forth the relevant tests for analyzing whether a state's tax violates the commerce clause. The first prong of the *Complete Auto* test requires a finding of an "activity with a *substantial* nexus with the taxing State." *Complete Auto*, 430 U.S. at 279. Far from abandoning *Bellas Hess*, this Court's later decisions make it abundantly clear that *Bellas Hess* is not only entirely consistent with *Complete Auto*, but is the touchstone of the first prong of *Complete Auto*. As this Court stated in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981):

> Under this threshold test, the interstate business must have a substantial nexus with the State before *any* tax may be levied on it. See *National Bellas Hess, Inc. v. Illinois Revenue Dept.*, 386 U.S. 753 (1967).

Commonwealth Edison, 453 U.S. at 626 (emphasis in original).

Far from being rejected, the *Bellas Hess* decision was directly incorporated into the *Complete Auto* commerce clause test.[20] In fact, it is the North Dakota "ubiquitous presence" standard that is inconsistent with this Court's pronouncements in *National Geographic* and *Complete Auto*. Both of these cases require a "physical presence" to sustain a finding of "substantial nexus" with the taxing state, before tax liability may be imposed on the out-of-state business. In both *National Geographic* and *Complete Auto*, the "physical presence/substantial nexus" requirement was satisfied by officers, employees, substantial tangible personal property and localized business activities occurring within the taxing state. North Dakota's "ubiquitous presence" test thus ignores the first and fourth prongs of the *Complete Auto Transit* test by discarding the requirements that "the tax [be] applied to an activity with a substantial nexus with the taxing state" and that "[the tax be] fairly related to the services provided by the state." *Complete Auto*, 430 U.S. at 279. At the very least, under this Court's holdings the interstate business must have a physical presence with the taxing state before any tax may be levied on it. *Commonwealth Edison*, 453 U.S. at 626. North Dakota's "ubiquitous presence" test fails to incorporate this crucial element of physical presence and is constitutionally deficient under this Court's existing precedent.

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[20] This Court's decisions in *Tyler Pipe Industries, Inc. v. Washington Dept. of Revenue*, 483 U.S. 232 (1987) and *Standard Pressed Steel v. Washington Dept. of Revenue*, 419 U.S. 560 (1975), do not support the North Dakota Court's refusal to follow *Bellas Hess*. In both cases this Court focused on the substantial in-state activities of the taxpayers to uphold a finding of tax nexus. Standard Pressed Steel had one full-time employee and a group of other employees that regularly visited with the company's principal customer in Washington. 419 U.S. at 561. Tyler Pipe had independent sales representatives who acted daily on behalf of Tyler Pipe in calling on its customers and in soliciting orders in Washington. 483 U.S. at 249.

The continuing validity of *Bellas Hess* was again recognized by this Court in *Goldberg v. Sweet*, 488 U.S. 252 (1989). In *Goldberg*, this Court was called upon to decide whether an Illinois tax on interstate telecommunications violated the commerce clause. In deciding that issue, *Bellas Hess* was cited as relevant authority when this Court expressed doubts "that termination of an interstate telephone call, by itself" provided sufficient nexus for a state to tax that telephone call.[21] *Goldberg v. Sweet*, 488 U.S. at 263. This Court's statement in *Goldberg* is consistent with the holding in *Bellas Hess* that vendors who "do no more than communicate with customers" in the taxing state are constitutionally protected from use tax collection duties. *Bellas Hess*, 386 U.S. at 758.

In *D.H. Holmes Co. v. McNamara*, 486 U.S. 24 (1988), this Court implicitly reaffirmed its *Bellas Hess* holding. In *D.H. Holmes*, the Court addressed an attempt by Louisiana to impose use tax liability on D.H. Holmes, a Louisiana retailer, for catalogs it had printed out of state and shipped to Louisiana. D.H. Holmes maintained its principal place of business in New Orleans, operated 13 stores there and employed approximately 5,000 workers in Louisiana. 486 U.S. at 26-27. D.H. Holmes argued that it should be treated like the mail order company in *Bellas Hess*, "apparently view[ing] its catalog distribution as analogous to the mail order solicitation in *National Bellas Hess*." *D.H. Holmes*, 486 U.S. at 33. Chief Justice Rehnquist, in a unanimous decision, restated with approval this Court's holding in *Bellas Hess* and distinguished D.H. Holmes on the ground that the retailer was clearly physically present in Louisiana.

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[21] All parties in *Goldberg v. Sweet* conceded that the "substantial nexus" test of *Complete Auto* had been satisfied because each party owned property located in Illinois. 488 U.S. at 256 n.6, 258 n.9, 260.

The conclusion that *Bellas Hess* is not "obsolescent" law is demonstrated not only by this Court's own decisions, but also by the overwhelming number of lower federal and state courts that have acknowledged the continuing vitality and usefulness of the *Bellas Hess* "physical presence" standard.[22] Recognizing the fact that *Bellas Hess* controls the constitutionality of states' attempts to tax out-of-state mail order houses, courts have applied *Bellas Hess* to invalidate states' imposition of use tax collection obligations on businesses which lack a physical presence in the state. Two state supreme courts have invalidated their states' attempts to impose use tax collection duties on businesses that do not have a physical presence in the state (*SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn.), *cert. denied* 111 S. Ct. 2839 (1991); *Cally Curtis Co. v. Groppo*, 572 A.2d 302 (Conn.), *cert. denied*, 111 S. Ct. 77 (1990); *Bloomingdale's By Mail Ltd. v. Dept. of Revenue*, 591 A.2d 1047 (Pa. 1991), *aff'g* 567 A.2d 773 (Pa. Commw. Ct. 1989) (per curiam) *cert. applied for sub nom Penn. v. Bloomingdale's By Mail Ltd.*, No. 91-383) and a federal district court invalidated California's attempt to impose use tax collection obligations on direct marketing companies with no physical presence in that state. *Direct Marketing Ass'n v. Bennett*, No. Civ. S-88-1067 (E.D. Cal. July 12, 1991) (1991 U.S. Dist. LEXIS 10736). *See also L.L. Bean, Inc. v. Commonwealth of Pennsylvania*, 516 A.2d 820 (Pa. Commw. Ct. 1986); *Book-of-the-Month Club, Inc. v. Porterfield*, 268 N.E.2d 272, 274 (Ohio 1971).

The "physical presence" standard articulated in *Bellas Hess* is the only appropriate test for application by lower courts reviewing the availability of commerce and due process protections to national marketers.[23] North Dakota's determination that this Court's decisions in this area have been made "obsolescent precedent" by the passage of time completely misses the mark and abandons a reliable standard under which businesses can predictably operate.[24]

[22] Federal and state cases citing *Bellas Hess* are listed at Pet. App. A76. Appendix 4 contains a partial listing and summary of these cases. *See also* Tribe, *American Constitutional Law* at 450, 460 (2d ed. 1988).

The Standards for Personal Jurisdiction and Tax Nexus Differ.

The North Dakota Supreme Court's reliance on *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), and other personal jurisdiction cases to establish tax nexus is misplaced. The North Dakota Supreme Court fails to note that this Court in *Bellas Hess* refused to adopt a tax standard fashioned from personal jurisdiction cases. In *Bellas Hess*, the State of Illinois urged this Court to adopt the "economic benefits" test that had already been applied in the personal jurisdiction cases for at least seventeen years. Appellee's Brief at 32-34, *National Bellas Hess* (O.T. 1966, No. 241). This Court declined to adopt that test to establish tax nexus and held in *Bellas Hess* that even continuous and systematic solicitation by mail would not create tax nexus as long as the taxpayer did not maintain a physical presence in the state. This Court has consistently distinguished between these two standards, tax nexus and personal jurisdiction. *See Travelers' Health Assoc. v. Virginia*, 339 U.S. 643, 653-54 (1950) (Douglas, J., concurring):

[23] The physical presence test as articulated in *Bellas Hess* is also consistent with this Court's decisions that prohibit states from requiring a foreign corporation to qualify to do business unless the corporation conducts intrastate, localized business activities. *See Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 33 (1974).

[24] The North Dakota Supreme Court has also failed to give the appropriate deference to this Court's decisions, which violates the doctrine of federal supremacy. *See* Quill's Petition for Writ of Certiorari at 17-22.

> It is the nature of the state's action that determines the kind or degree of activity in the state necessary for satisfying the requirements of due process.
>
> * * * * *
>
> The requirements of due process may demand more or less minimal contacts . . . depending on what the pinch of the decision is or what [a state] requires of the foreign corporation.

The North Dakota Supreme Court confuses the differing standards between personal jurisdiction and tax nexus, and restates an argument rejected by this Court in *Bellas Hess*. The North Dakota court improperly substitutes its "ubiquitous presence" test—a standard which is ultimately no greater than that imposed in the personal jurisdiction cases; a standard that this Court refused to apply to determine tax nexus when deciding *Bellas Hess*.

II. NATIONWIDE APPLICATION OF THE NORTH DAKOTA RULING RESULTS IN CUMULATIVE AND DISCRIMINATORY BURDENS ON OUT-OF-STATE MAIL ORDER VENDORS.

This Court has the benefit of careful congressional investigations of the impact of sales and use tax laws as applied to interstate commerce.[25] Congress is well aware

[25] Congress is fully aware of the *Bellas Hess* rule and over the years has considered legislation urged by the states to change that rule. Congress authorized hearings and studies to evaluate imposing state sales/use tax collection obligations on out-of-state vendors who did not maintain a physical presence within the taxing state. Legislation proposing a uniform federal response to state imposition of sales/use tax obligations has been introduced numerous times. Congress has declined to enact such legislation without state and local government agreement as to uniformity in application.

H.R.2230 ("Equity in Interstate Competition Act of 1989"), 101st Cong., 1st Sess. (1989); S.480 ("Equity in Interstate Competition Act of 1989"), 101st Cong., 1st Sess. (1989) (requiring uniform local

(Footnote continued on following page)

of the claims of the state taxing authorities. It has studied and has attempted to resolve the various complex problems associated with the imposition of tax burdens on out-of-state vendors. In recent years numerous bills have been introduced to achieve at the federal level the goal that North Dakota seeks here.[26]

[25] *continued*

tax for application and setting minimum jurisdictional standards nationally ($12.5 million) and by state ($500,000)); S.2368, 100th Cong., 2nd Sess. (1988) (setting annual sales minimum for jurisdiction at $15 million nationally or $750,000 by state and providing variable local sales tax component); H.R.3521, 100th Cong., 1st Sess. (1987); H.R.1891, 100th Cong., 2nd Sess. (1987); H.R.1242, 100th Cong., 1st Sess. (1987) (establishing $5 million national annual sales minimum and requiring uniform local rate throughout the state); S.1099, 100th Cong., 1st Sess. (1987) (stating minimum jurisdictional standards including annual sales nationally of $12.5 million and providing local sales tax component); S.639, 100th Cong., 1st Sess. (1987). Hearings have also been held to evaluate a federal solution. *Interstate Sales Tax Collection Act of 1987 and the Equity in Interstate Competition Act of 1987: Hearings on H.R.1242, H.R.1891 and H.R.3521 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. (1988) ["Hearings on H.R.1242, H.R. 1891 and H.R.3521"]; *Collection of State Sales and Use Taxes by Out-of-State Vendors: Hearings Before the Subcomm. on Taxation and Debt Management of the Senate Comm. on Finance to Consider S.639 and related S.1099, the Equity in Interstate Competition Act of 1987*, 100th Cong., 1st Sess. (1987) ["Hearings on S.639 and S.1099"].

[26] *See* note 25. Bills were introduced and considered in earlier years. *See* H.R.3549, 99th Cong., 1st Sess. (1985); S.1510, 99th Cong., 1st Sess. (1985); S.983, 96th Cong., 1st Sess. (1979); S.2173, 95th Cong., 1st Sess. (1977); S.2811, 93rd Cong., 1st Sess. (1973); S.2092, 93rd Cong., 1st Sess. (1973); S.282, 93rd Cong., 1st Sess. (1973); H.R.11798, 89th Cong., 1st Sess. (1965); introduced October 22, 1965 by Rep. Willis (ten companion bills with substantially similar text were also introduced by other representatives).

Hearings have been conducted on many of the bills: *See* note 25; *see also, Interstate Sales Tax Collection Act of 1987: Hearing on H.R. 1242 before the Subcomm. on Select Revenue Measures for the House Comm. on Ways and Means*, 100th Cong., 1st Sess. (1987) ["Hearing on H.R. 1242"]; *State Taxation of Interstate Commerce:*

(Footnote continued on following page)

While there is debate about the form that such legislation should take, all of the proposals seek to address the substantial compliance burdens for out-of-state mail order vendors recognized by this Court in *Bellas Hess*, 386 U.S. at 753, 759-60.

The typical mail order vendor sends advertising into regional and national markets and receives orders from many jurisdictions. If North Dakota may require a mail order firm to collect taxes merely because it mails catalogs to customers who reside there, then so may every other state in which the vendor has customers. A nationwide application of the North Dakota law would require every mail-order vendor to register under the sales/use tax laws in every state in which it had customers, and incur liability to collect and pay over use taxes for thousands of counties, municipalities and school districts which impose sales/use taxes. For a mail order firm whose advertising runs nationwide, compliance means acting as a tax collector for each of the states and local subdivisions that impose sales and use taxes, approximately 6500 jurisdictions.[27]

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[26] *continued*
Hearing on S.1510 before the Subcomm. on Taxation and Debt Mgmt. of the Senate Comm. on Finance, 99th Cong., 1st Sess. (1985) ["Hearing on S.1510"]; *Interstate Taxation: Hearings on S.2173 before the Committee on the Judiciary*, 95th Cong., 1st and 2nd Sess. (1977 and 1978); *State Taxation of Interstate Commerce: Hearing on S.282, S.1245, S.2092 and H.R.2096 before the Subcomm. on State Taxation of Interstate Commerce of the Senate Comm. on Finance*, 93rd Cong., 1st Sess. (1973); *Interstate Taxation Act: Hearings on H.R.11798 and Companion Bills before the Special Subcomm. on State Taxation of Interstate Commerce of the Comm. on the Judiciary*, 89th Cong., 2nd Sess. (1966); *State Taxation of Interstate Commerce: Report of the Special Subcomm. on State Taxation of Interstate Commerce of the House Comm. on the Judiciary*, 89th Cong., 1st Sess., H. Rept. 565 (1965) ("Willis Report").

[27] When this Court considered *Bellas Hess*, it considered the burdens that would be caused by compliance with approximately

(Footnote continued on following page)

In 1967, this Court found that this inevitable result imposed a serious burden on interstate commerce and due process. *Bellas Hess*, 386 U.S. at 759-760. If state laws were uniform and states would accept one set of records, the cumulative burden might be no more than proportionate to the volume of business. The difficulty results from the variations and inconsistencies in state laws and record-keeping requirements. In 1966 Congressman Willis, Chairman of the Special Subcommittee, described the plight of the typical out-of-state mail order vendor under a theory similar to that currently espoused by North Dakota:

> If it were to anticipate shipping its products into any State, city, county or hamlet from which it received an order, it would require a compilation of 80 volumes of State and local tax laws which reaches more than 22 feet in height when piled one on the other.[28]

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[27] *continued*
2300 tax jurisdictions. *Bellas Hess*, 386 U.S. at 759 n.12; Willis Report 841-845. Professor Archibald Cox set forth before this Court in explicit detail the disproportionate burdens which would be placed on interstate commerce if state and local governments were able to impose use tax collection burdens on out-of-state vendors who conducted a general interstate business. Brief for Appellant, App. B at 55-69 *Bellas Hess* (O.T. 1966, No. 241).

The compliance obligations, based on the number of taxing jurisdictions, have increased almost threefold with the passage of time. Advisory Commission on Intergovernmental Relations, *State and Local Taxation of Out-of-State Mail Order Sales* 6, 11 (April 1986) ["ACIR Report"]; and Note, *Collecting the Use Tax on Mail-Order Sales*, 79 Geo. L.J. 535, 539 (1991).

[28] 112 Cong. Rec. A-5055 (Sept. 30, 1966). Congressman Willis was addressing the insurmountable problems faced by the small business having to cope with the complex state and local tax requirements every time its products or its advertising materials are sent across state lines:

> [I]t is important to remember that the small businesses of our Nation are conducted by men who have already demonstrated their willingness to comply with reasonable and equitable tax laws. Our present system of taxing interstate commerce defies

(Footnote continued on following page)

The Willis Report discloses—

> in all cases the charging and recording of sales tax is more complicated than in a retail store. One reason is, of course, the many States to which mail orders are sent from a single mail-order plant. [Report 771.]
>
> * * * * *
>
> The interstate seller of consumer goods . . . has the same costs as a local firm selling the same types of items *plus the added costs of complying with the laws of many States at once.*[29]

The cumulative burdens so obvious in the 1960's are even more onerous today.[30]

[28] *continued*
even their most conscientious efforts. Today, if a small company with less than 50 employees located in my State of Louisiana—or in Michigan, or in Maine, or in any one of the other States—were to invest not more than $100 a month for advertising in a trade journal which is given national distribution, it will expose itself to potential tax reporting requirements that are staggering. *Id.*

[29] Willis Report, p. 812 (emphasis added).

[30] *See Hearing on S.1510* at 80-82 (testimony of Alan Glazer on behalf of the Direct Marketing Ass'n); *Hearings on H.R. 1242, H.R. 1891* and *H.R. 3521* at 129-130 (testimony of Nat Standing of J.C. Penney Company stating that the administrative costs of compliance "are enormous"); Levering, *Federal Legislation*, 4 N.Y.U. Inst. on State and Local Taxation, ch. 8 at §8.03 (1986).

Federal legislation proposed in the wake of *Bellas Hess* would have allowed collection of local use taxes *only* if those taxes were uniform as to rate, base and administration by the state. *See* S.282, 93rd Cong., 1st Sess. (1973); S.2092, 93rd Cong., 1st Sess. (1973); and S.2173, 95th Cong., 1st Sess. (1977).

Current legislative proposals also seek uniformity and the elimination of the tremendous compliance burdens that would face out-of-state mail order vendors and their customers. These proposals would establish a uniform national rate of tax, an adequate collection allowance, uniform national definitions of exempt items, a uniform tax treatment of shipping and handling charges, and a single filing and audit procedure. *See, e.g.*, Committee on State Taxation of the Council of State Chambers of Commerce, *COST*

(Footnote continued on following page)

A. Compliance Burdens Associated with Variances in Tax Laws.

The North Dakota Supreme Court trivializes the expense and administrative burdens which would result from requiring mail order companies to register and comply with the sales/use tax provisions for the 45 states and more then 6500 local taxing jurisdictions in the United States. These costs and problems are immense.[31]

Sales taxes in the various state and local jurisdictions vary considerably. Not only do the tax rates differ, but there is also great disparity in the designations of exempt items. *See* Brief of Amicus Curiae Coalition for Small Direct Marketers In Support of Petitioner, pp. 13-28.

[30] *continued*
Endorses Compromise on Bellas Hess Legislation, State Tax Report Nos. 253 at 1 (Sept. 26, 1990); 244 at 1 (Dec. 15, 1989). The reluctance of Congress to enact federal legislation without agreed uniformity among state and local taxing units highlights the numerous compliance problems facing out-of-state mail order vendors.

[31] The Advisory Commission on Intergovernmental Relations, a nonpartisan Congressionally-authorized body, has examined the issue of state and local taxation of mail order sales in the context of possible federal legislation. In its Executive Summary dated August 26, 1985, the ACIR recognized the significance of the compliance burdens on mail order companies:

> Heavy compliance burdens: The mail order firms could be forced to shoulder extraordinary compliance burdens if they are required to comply with the differing tax code provisions of 45 states and 7000 local governments that are now imposing sales taxes. (Page 2, Executive Summary, dated Aug. 26, 1985.)

In its recommendation for federal legislation on this subject, "in order to minimize compliance costs for firms operating in multiple jurisdictions," the ACIR proposed that a "non-discriminatory single rate" be established. (Recommendation of Advisory Commission on Intergovernmental Relations dated September 20, 1985.)

B. Collection Problems.

In the event that the customers fail to include the tax, the out-of-state mail order vendor must commence collection efforts for the tax. If the tax is not collected from the customer, all state sales/use tax laws (*See, e.g.*, N.D. Cent. Code § 57-40.2-06) impose liability for payment on the mail order vendor. Sales and use taxes are uniformly imposed on sales, not on collections. N.D. Cent. Code § 57-40.2-02.1. The North Dakota statute precludes a retailer from absorbing the tax by paying it (N.D. Cent. Code §§ 57-40.2-07(3) and 57-40.2-08) but makes no provision for the possibility that the retailer may not be able to collect the tax. A *local retailer* facing a tax-resisting customer can resolve a dispute by declining to consummate the sale until the tax is paid. Out-of-state mail order vendor collection problems are different because the customer is miles away and the out-of-state vendor's costs in collecting taxes are many times greater.[32]

C. Problems in Determining Tax Liabilities.

The out-of-state vendor faces heavier burdens than the local retailer with respect to computing the correct tax. A local retailer usually deals with customers at a given location. A mail order vendor like Quill normally has a nationwide business and receives orders from as many as

[32] *See, e.g., Hearings on H.R.1242, H.R. 1891 and H.R.3521* at 199-200 (testimony of William T. End emphasizing the difficulties associated with providing complicated rate, exemption and other information to customers by catalog and attempting to collect unpaid tax after shipment of merchandise or face payment of the tax without reimbursement); *Hearing on H.R.1242* at 129-131 (testimony of Alan Glazer regarding the burdensome costs associated with handling orders on which insufficient tax is paid, follow-up costs and the reality for such costs to overrun the amount of tax due on the particular sale).

fifty states. Sales and use tax rates must be separately computed and tax exemptions determined in each state, county or village.[33] The out-of-state vendor bears the direct tax burdens resulting from misapplication of any state tax rate and exemption; the vendor also bears the burden for processing customer refund claims for erroneously paid taxes, irrespective of whether the customer or vendor has erred.

D. Recordkeeping Burdens.

Recordkeeping for reporting and audit purposes requires maintaining separate records for every state and local taxing jurisdiction where taxes are collected. Sales and use tax rules require detailed supporting records to verify sales, taxes collected, applicable exemptions and timely remittances. Returns are required to be filed quarter-monthly, monthly or quarterly depending on state and local rules.

Computer software programs simply do not solve the cumulative compliance burdens and audit requirements with which Quill and other out-of-state vendors would be faced, nor would computers eliminate the substantial costs of collection.[34] Computers cannot defray the substantial

[33] Appendix 2 summarizes the compliance obligations and rate change effects of North Dakota's sales and use tax laws with which Quill and other mail order vendors would be required to contend. Appendix 3 summarizes some of the variations among state sales/use tax laws in the forty-five state taxing jurisdictions with which mail order vendors would be forced to contend if required to collect taxes in each jurisdiction where sales are made. Local variations to the state rules are too numerous to list and are not summarized in the Appendix.

[34] Computer tax programs are not equipped to recognize tax exemptions for products, nor can such programs judge whether products fit within a given exemption. *See, e.g., Hearing on H.R.1242*

(Footnote continued on following page)

costs of nearly perpetual audits.[35] Computers cannot reduce the costs faced by the out-of-state mail order vendor when customers fail to pay, or underpay, the taxes due.[36] Mail order companies of necessity must rely on their customers to know the tax rate in their own jurisdiction, determine which items are and are not exempt, properly calculate the tax due, and remit it. Customers do not always have access to complete and current tax information and routinely fail to pay, or underpay, the tax due. *See* Note, *Collecting the Use Tax on Mail Order Sales*, 79 Geo.L.J. 535, 540 (1991).

The dilemma and hardship that out-of-state mail order vendors will encounter if required to collect the sales/use taxes in a large number of states and localities was underscored by this Court:

> And if the power of Illinois to impose use tax burdens upon National [Bellas Hess] were upheld, the resulting impediments upon the free conduct of its

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[34] *continued*
at 178 (testimony of Heath Line); *Hearing on S.639 and S.1099* at 52 (testimony of Robert Levering); and *Hearing on H.R.1242* at 134 (statement of Alan Glazer).

Levering, *An Examination of the Merits of Federal Legislation to Require Out-of-State Mail Order Companies to Collect State Use Taxes*. 4 NYU Inst. on State and Local Tax'n, § 8.03[1] (1986).

Touche Ross, *A Study to Determine the Economic Impact on Mail Order Firms of Multistate Sales Tax Collection* at 5 (1986).

[35] Aside from enormous recordkeeping and record production requirements, the growth in the number of taxing jurisdictions raises the specter of nearly perpetual audits. *Hearing on H.R.1242* at 31-32 (colloquy between Rep. Judd Gregg and Deputy Assistant Secretary of the Treasury O. Donaldson Chapoton). *Cf.* Brief for Appellant at 27-28, *Bellas Hess* (O.T. 1966, No. 241).

[36] "[M]ail order firms cannot effectively control the amount of tax, if any, that has been computed and submitted by the customer without a rather costly effort. I think that the mail order industry has effectively communciated their concern on this issue—a concern that appears valid based on my experience." *Hearing on S. 639 and S. 1099* at 206 (Letter from Ray Westphal to Senator Max Baucus (November 24, 1987)).

> interstate business would be neither imaginary nor remote. For if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes. The many variations in rates of tax, in allowable exemptions, and in administrative and recordkeeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose "a fair share of the cost of the local government."
>
> * * * * *
>
> The very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements. Under the Constitution, this is a domain where Congress alone has the power of regulation and control.

Bellas Hess, 386 U.S. at 759-60.

E. Overall Burdens on Commerce.

In deciding whether there is sufficient "nexus" to support collection of state sales/use taxes, the resulting burden must be weighed against the vendor's contacts with the taxing state. A contact that will support a slight obligation will not sustain one that is so onerous as to clog interstate markets.

To paraphrase this Court's holding in *Bellas Hess*:

> The many variations in rates of tax, in allowable exemptions and in administrative and recordkeeping requirements could entangle [Quill's] interstate business in a virtual welter of complicated obligations [to North Dakota, as well as other states which have] . . . no legitimate claim to impose a fair share of the cost of local government.

Bellas Hess, 386 U.S. at 759-60.

North Dakota would justify its policy by urging that the "privilege" of selling to customers in North Dakota is

benefit enough. At the very core of the commerce clause is the purpose of creating "an area of free trade among the several states." *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944). The practical effect of the North Dakota decision is to hold hostage the privilege of participating in the national market created by the commerce clause. If the law in this field is to change, it should originate in Congress—which is mindful of the commerce clause concerns—and not be the product of forty-five different and divergent sets of state legislation.

III. UNCERTAIN STANDARD CREATED BY NORTH DAKOTA LAW.

The uncertainty of North Dakota's "ubiquitous presence" test will create widespread confusion for the business community and for state tax administrators. Out-of-state mail order vendors operating throughout the nation will be forced to speculate whether their solicitations are sufficient to subject them to use tax obligations and will be unable to adequately forecast tax liability.[37]

Approval of the North Dakota statute is likely to spawn additional litigation. If this Court determines that Quill's solicitations in North Dakota create an "ubiquitous presence" sufficient to justify a use tax collection duty, other courts will be required to determine in future cases whether a company with one or more solicitations (and no physical

[37] The North Dakota statute uses the terms "regular and systematic solicitation" which the Tax Commissioner has interpreted as three or more mailings into the state. North Dakota's definition of this term is not consistent with other states' use of similar terms in recently enacted state "anti-*Bellas Hess*" legislation. *See* Brief of Amici Curiae, L.L.Bean, Inc. et al., Appendix C, for a listing of states that have enacted "anti-*Bellas Hess*" legislation and the various standards used by those states to establish tax nexus.

presence) may be compelled to collect use tax. Similarly, this Court will be asked to review other state "anti-*Bellas Hess*" legislation that focuses on sales rather than solicitations,[38] to determine whether $100,000 of business or ten sales or the use of credit cards[39] constitute a sufficient basis to justify the burden on interstate commerce created by requiring an out-of-state vendor having no physical presence in the taxing jurisdiction to collect taxes. The lines to establish a justifiable tax basis rule under the commerce clause should not change based on state tax administration.[40]

[38] *See, e.g.*, Minn. Stat. § 297A.21 (West Supp. 1991); Mo. Stat. Ann. § 27-67-4 (Supp. 1989); Vt. Stat. Ann. tit. 32 § 9701(9) (Supp. 1990).

[39] *See* Cal. Rev. & Tax. Code § 6203 (West Supp. 1991).

[40] Proponents and critics of the "physical presence" test alike have argued that Congress, not the judiciary, is better equipped to establish a workable "economic presence" test that will foster certainty and stability and permit interstate businesses to order their investments in reliance on clear principles. *See, e.g.*, Nagel, *The Emergence of a Single Nexus Standard*, 45 Tax Notes No. 3, 237 (October 16, 1989) at 334 ("Ideally, the Supreme Court should not be in the business of making state tax law. This is something that is best left to Congress"); Hartman, *Collection of the Use Tax on Out-of-State Mail-Order Sales*, 39 Vand. L. Rev. 993, 1028 (1986) (arguing that congressional action is needed because "[t]here appears to be no adequate judicial machinery to establish such [fair compliance] costs"); Note, *Collecting the Use Tax on Mail Order Sales*, 79 Geo.L.J. 535 at 565 (arguing that congressional action is necessary because "[w]hen Congress drafts legislation on use tax collection both the mail-order industry and the state taxing agencies are represented . . ."); Pomp, *Determining the Boundaries of a Post-Bellas Hess World*, 44 Nat'l Tax J. No. 2, 237, 239 (June 1991) (urging that federal legislation be "resurrected" because ". . . the compliance burdens [are] too significant for the issue to be left to each state acting in isolation and motivated only by its own financial interests.").

IV. CONGRESS IS THE APPROPRIATE BODY TO REGULATE AND CONTROL COMMERCE.

The distinction drawn in decisions of this Court, that physical presence within a state is required before tax obligations may be imposed upon the out-of-state vendor, is firmly imbedded in business practice and state tax administration,[41] and is a workable standard. State tax administrators, although anxious to extend their sources of revenue, have accepted for approximately twenty years this distinction.[42] In recent years a number of states have attempted to redraw this distinction and have passed "anti-*Bellas Hess*" legislation purporting to create use tax obligations for out-of-state vendors not physically present in the state.[43] Approximately nineteen states, including North Dakota, have adopted a more pragmatic alternative to collecting use taxes. Instead of requiring the out-of-state vendor to collect such taxes, these states collect the taxes directly from the consumer by providing integrated returns to facilitate use tax and income tax reporting. Other states annually issue separate use tax returns specifically designed for consumer self assessment.[44]

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[41] *Hearing on H.R. 1242* at 60-61 and *Hearing on S.1510* at 59-60 (testimony of North Dakota Senator Nething on behalf of National Conference of State Legislatures recognizing *Bellas Hess* as the standard in efforts to promote federal legislation); *Hearing on S. 1510* at 80-81 (testimony of Alan Glazer on behalf of Direct Marketing Association stating that proposed legislation to overturn *Bellas Hess* "would unfairly change the ground rules for a significant segment of American business.")

[42] *See* All States Tax Guide, (P-H 1982 ed.) ¶252, (P-H 1985 ed.) ¶252 and (P-H 1988 ed.) ¶252 for a compilation of state tax administrators' responses to questions regarding the applicability of *Bellas Hess*.

[43] These states have adopted various standards to establish tax nexus, making the use of credit cards and "800" telephone numbers, sales on approval, and similar chimerical contacts sufficient to require imposition and collection of sales and use taxes. *See* Brief of Amici Curiae, L.L. Bean et al., Appendix C.

[44] See Appendix 3.

North Dakota, however, is one of 36 states that has legislatively attempted to ignore the line drawn by *Bellas Hess*.[45] If the "physical presence" test is to be abandoned and replaced with some other standard,[46] Congress is the appropriate body to determine the extent to which out-of-state vendors should be held responsible for remitting sales and use taxes to states in which their only connection with customers is by common carrier or the United States mail and that test would be changed prospectively.

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[45] The North Dakota legislature recognized that the 1987 amendments to the North Dakota Use Tax Law when enacted conflicted with this Court's decision in *Bellas Hess*. *See* House Concurrent Resolution ("H. Con. Res.") No. 3083 (which urged Congress to enact federal legislation to allow the states to impose sales and use tax obligations on out-of-state mail order vendors) (Pet. App. A58-59); *See also* 1987 House Committee Minutes regarding H. Con. Res. 3083, where State Rep. Hoffner, who introduced H. Con. Res. 3083, urged support for the Resolution by stating:

> The [North Dakota] house of representatives passed HB 1195 some weeks ago by a wide margin and that has a fiscal positive aspect on the state of about 14.1 million dollars. *The state can only realize that revenue if Congress passes this kind of [federal] legislation* (emphasis added). (Pet. App. A60.)

HB 1195 and SB 2555 amended N.D. Cent. Code § 57-40.2-01(6) and (7), which is the subject matter of this petition.

See also Testimony Before the House Finance and Taxation Committee (Jan. 13, 1987) where State Tax Commissioner M.K. Heidi Heitkamp stated:

> [T]his Bill [HB 1195] prepares the State for immediate implementation of any federal legislation. (Pet. App. A66.)
>
> * * * * *
>
> HB 1195 is part of the Tax Department's continuing effort to stop sales and use tax loss, caused by the decision in [Bellas Hess] . . . The decision continues to allow out-of-state direct marketers . . . to refuse to collect "use" taxes from buyers . . . (Pet. App. A62.)

[46] The Brooks bills, H.R. 3521 in the 100th Congress and H.R. 2230 in the 101st Congress, contain the standard proposed by the states with respect to jurisdiction to tax interstate transactions under state sales tax laws. The standard is, in essence, the amount of sales to customers in the state. The Multistate Tax Commission has also advocated a similar standard for jurisdiction with respect to state income tax laws. (Resolution dated July 13, 1984, All States Tax Guide (P-H) ¶ 694-B).

Justices Black, Frankfurter and Douglas wrote a dissenting opinion in *McCarroll v. Dixie Greyhound Lines, Inc.*, 309 U.S. 176 (1940), wherein they said:

> Judicial control of national commerce—unlike legislative regulations—must from inherent limitations of the judicial process treat the subject by the hit-and-miss method of deciding single local controversies upon evidence and information limited by the narrow rules of litigation. Spasmodic and unrelated instances of litigation cannot afford an adequate basis for the creation of integrated national rules which alone can afford that full protection for interstate commerce intended by the Constitution. We would, therefore, leave the questions raised by the Arkansas tax for consideration of Congress in a nation-wide survey of the constantly increasing barriers to trade among the States. Unconfined by the 'narrow scope of judicial proceedings' Congress alone can, in the exercise of its plenary constitutional control over interstate commerce, not only consider whether such a tax as now under scrutiny is consistent with the best interests of our national economy, but can also on the basis of full exploration of the many aspects of a complicated problem devise a national policy fair alike to the States and our Union.

McCarroll, 309 U.S. at 188-189.

In *Stockham Valves* and *Northwestern States Portland Cement*, Mr. Justice Frankfurter said:

> Congress alone can provide for a full and thorough canvassing of the multitudinous and intricate factors which compose the problem of the taxing freedom of the states and the needed limits on such state taxing power.

Williams v. Stockham Valves & Fittings and *Northwestern States Portland Cement v. Minnesota*, 358 U.S. 450 at 476 (1959).

As stated by Justice Marshall in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981):

> [t]he nature of the factfinding and judgment that would be required of the courts merely reinforces the conclusion that questions about the appropriate level of state taxes must be resolved through the political process.

Commonwealth Edison, 453 U.S. at 628.

Indeed, there has been a long and active effort by states to expand their power to require out-of-state vendors to collect and remit sales and use taxes. Nevertheless, a coalition of local governments has thus far frustrated such efforts.[47]

If this Court abandons the physical presence test and subjects mail order vendors including Quill to state tax collection burdens, there will be economic chaos in the mail order industry. Potential retroactive liability in most states (excluding Connecticut)[48] will literally wipe out these businesses. Mail order vendors cannot collect taxes on past sales. The strong Congressional reluctance to expand the states' taxing powers by overturning the *Bellas Hess* standard is based on the conflicts between: (i) the constitutional need to eliminate cumulative substantial and discriminatory burdens on the interstate commerce of out-of-state mail order vendors; and (ii) the state and local governments' inability to get together to eliminate those burdens. This Court should not make the Congressional resolution of this conflict unnecessary; the result would be chaos.

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[47] *See* Kirschten, *Division in Mail-Order Tax Coalition*, 21 Nat'l J. No. 19, May 13, 1989 at 1195; 21 Nat'l J. No. 20, May 20, 1989 at 1266.

[48] *See SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn.), *cert. denied*, 111 S. Ct. 2839 (1991); *Cally Curtis Co. v. Groppo*, 572 A.2d 302 (Conn.), *cert. denied*, 111 S. Ct. 77 (1990).

CONCLUSION

For the foregoing reasons, Quill respectfully requests this Court to reverse the judgment below.

Respectfully submitted,

November 21, 1991.

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APPENDICES

APPENDIX 1

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1966

NATIONAL BELLAS HESS, INCORPORATED, Appellant,	)	
vs.	)	No. 241
DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS, Appellee.	)	

Washington, D.C.
Thursday, February 23, 1967

The above-mentioned matter came on for argument at 10:14 o'clock, a.m.

BEFORE:

EARL WARREN, Chief Justice of the United States
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
TOM C. CLARK, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON H. WHITE, Associate Justice
ABE FORTAS, Associate Justice

APPEARANCES:

ARCHIBALD COX, ESQ., Langdell Hall, Cambridge, Massachusetts; on behalf of the appellant.

TERENCE F. MacCARTHY, ESQ., Special Assistant Attorney General, State of Illinois; on behalf of the appellee.

Oral Argument of Mr. Terence F. MacCarthy, Esq.

on Behalf of Appellee

[Department of Revenue of the State of Illinois]

[pp. 22-28 omitted]

[29] MR. JUSTICE FORTAS: Mr. MacCarthy, I am interested in the degree to which you would apply your statute. I hope you will come to that. For example, suppose that Macy's had a hundred customers in the State of Illinois and that Macy's enclosed advertising literature, catalogues, as they usually do I gather in their bills that were sent to these customers every month, would your statute cover that? I hope you will come to that kind of problem.

MR. MacCARTHY: I will answer it now if I may. Yes, the terms of the statute would definitely cover that particular transaction. The statute is quite broad and it mentions advertising per se. In this regard, I might indicate that the statute here is identical—not quite in total terms but definitely in legal terms to the statute before this Court in the Scripto v. Carson case. The Illinois statute is identical. So the Court has had before it a statute identical in terms to the Illinois Statute in the Scripto case.

For that matter in the Scripto case this Court spelled out in the footnote in the margin the Florida Statute.

MR. JUSTICE HARLAN: But would you have a similarity in the two cases?

[30] MR. MacCARTHY: Well they had 10 independent contractors in the Scripto case.

MR. JUSTICE HARLAN: And it was not similar to this case?

MR. MacCARTHY: No. The distinction in Scripto is that there were 10 independent contractors or specialty brokers. Here in lieu thereof we have the catalogues.

MR. JUSTICE FORTAS: This bothers me. Suppose Macy's had only one customer in Illinois and that customer had been to New York and opened a charge account at Macy's, and then thereafter Macy's sent monthly bills and said we are going to have a White Sale and we offer you bed linen at a bargain and the customer responds to that advertising and buys bed linen. Is that enough to subject Macy's to the duty of collecting a use tax?

MR. MacCARTHY: I think the issue then would be one resolved by the courts, Your Honor, and I think the issue as I will state in my suggestion as to the law to be distilled in this field will turn on the continuous and substantial nature of the business.

MR. JUSTICE FORTAS: That is what I am trying to get at. The statute says engaging in soliciting orders, and I ask you in effect whether Illinois makes a distinction between an occasional solicitation as in the cases I put to you or a regular solicitation.

[31] MR. MacCARTHY: In direct answer to your question—

MR. JUSTICE FORTAS: In this kind of thing where you have a sort of a broadside solicitation through mail order catalogues and fliers and so forth.

MR. MacCARTHY: In answer to your question, Mr. Justice Fortas, the Illinois Statute does not make the distinction.

MR. JUSTICE STEWART: How about continuing along the line suggested by my Brother Fortas. I suppose in your Illinois newspapers on Sunday the Book of the Month Club advertises and puts a little coupon in there to send in.

MR. MacCARTHY: Yes, Mr. Justice Stewart, it does. That is the issue in the case.

MR. JUSTICE STEWART: And your statute would cover them?

MR. MacCARTHY: Our statute would cover it. I am not presenting to this Court and I would make this distinction that those particular facts would satisfy the scrutiny of The Court under a due process argument. I am, however, and I make this point quite strongly, suggesting that the Court has before it a statute identical to the statute in Scripto. The Court has before it the particular facts in this case. I would like for particular emphasis to go on. We do not have a Macy's situation, as Mr. Justice Fortas would suggest, nor do we have what I would term the occasional type of advertising.

[32] MR. JUSTICE STEWART: Every Sunday throughout the year in every Chicago Tribune Sunday Paper.

MR. MacCARTHY: I would think the issue would turn not only on the advertising itself but by the business brought by the advertising.

MR. JUSTICE STEWART: The statute I think you already said makes no such distinction.

MR. MacCARTHY: Nor did the statute in Scripto which this Court put in footnote. The statute definitely makes no distinction.

MR. JUSTICE STEWART: And the statute would cover?

MR. MacCARTHY: Yes, sir. The Illinois Supreme Court opinion definitely would not tolerate it and I doubt if the opinion of this Court would.

MR. JUSTICE BRENNAN: Mr. MacCarthy, what is this—the word "engaging"? Is that why you say there is a distinction between the situation Justice Fortas postulated and this kind of case?

MR. MacCARTHY: Mr. Justice Brennan, I don't think the distinction is to be found in the words of the statute. The statute is quite broad. I think the distinction is to be found in the interpretation of the decisions of this Court in interpreting what is required for the nexus or the minimum contact required. I think that is the issue, and I suggest that it should be addressed in this case to the particular [33] circumstances of this case and not to circumstances as they might be in a subsequent case or another case.

MR. JUSTICE WHITE: You would not really say you would argue for a different result if Bellas Hess had simply switched from sending in catalogues to regular advertisements in the newspapers and on television and radio and sold the same amount of merchandise as a result of it?

MR. MacCARTHY: No, I definitely would not, Mr. Justice White. I think the results bear the most impor-

tance, not the method of advertising but rather the results.

MR. JUSTICE HARLAN: But you got to have some kind of a rule that businessmen can understand.

MR. MacCARTHY: Definitely.

MR. JUSTICE HARLAN: At least that is desirable.

MR. MacCARTHY: Oh definitely. I think there should be some kind of a rule they should understand. And the rule that I would suggest should be distilled from the cases of this Court is a rule which businessmen should well understand, and that is simply where a business is successfully in a state from a business point of view that that should be equated with presence from a legal point of view.

MR. JUSTICE HARLAN: Do you think that is the rule that the case disclosed?

MR. MacCARTHY: I think that is the rule that the case disclosed.

[34] MR. JUSTICE HARLAN: Irrespective of any sales or other physical contacts?

MR. MacCARTHY: Correct. I think that the form, I think that the decisions of this Court, most notably the recent Scripto decision, most definitely indicate that a formal distinction should not be given overemphasis but rather matters of substance should be considered. We should look to the success of the particular business in the state and not to the original form of arrangements enjoyed in the state.

MR. JUSTICE FORTAS: What you are saying, if I understand it, is that while the language of your statute

is very broad, you say, your position is that you recognize that there are limits as a constitutional matter.

MR. MacCARTHY: Yes, I do.

MR. JUSTICE FORTAS: And those limits would depend upon the volume and frequency. What are the factors?

MR. MacCARTHY: The factors upon which the limits would depend?

MR. JUSTICE FORTAS: Yes.

MR. MacCARTHY: I would suggest that the principle to be distilled from all of these cases, the nexus cases, is first that stress should be placed on substance and not form, and, secondly, that continual and systematic activity should be distinguished from occasional or casual activities.

MR. JUSTICE BRENNAN: What substance is that?

[35] MR. MacCARTHY: I might give an example. The use of common carriers as opposed to the use of their own trucks within a state. I would think that this is a matter of substance and not form.

Thirdly, I think that the method of solicitation—

MR. JUSTICE STEWART: Do you think that is a matter of substance? Which way did that cut in this case?

MR. MacCARTHY: I do not think there should be a legal distinction between the use of a common carrier within the state.

MR. JUSTICE STEWART: You think it should be the same as Miller even though it is common carrier—not private carrier?

MR. MacCARTHY: Yes, sir.

MR. JUSTICE STEWART: You think it should be the same as Miller though. Do you think it is substance and not form or just form and not substance?

MR. MacCARTHY: I would suggest that substance should take preference over the form.

MR. JUSTICE STEWART: Which is this distinction between common carriers and their own trucks.

MR. MacCARTHY: In other words, I am suggesting that the distinction that you would make would be a form of distinction between a common carrier on the one hand and a—

MR. JUSTICE STEWART: Form and not substance.

MR. MacCARTHY: Yes.

[36] MR. JUSTICE STEWART: Your own substance.

MR. MacCARTHY: Yes.

MR. JUSTICE BRENNAN: Are you saying you would make or would not make a distinction?

MR. MacCARTHY: I am making a distinction in answer to the questions.

Thirdly, I think that the method of solicitation matters not so long as it does not bear upon the in-state efficiency of the business, and I think this is definitely a principle we can take from the Scripto case.

And finally, I think, as I have already alluded to, successful presence in an economic sense should be equated with sufficient presence in a legal sense, and this, Mr. Justice Harlan, I would suggest would be a fine rule and the best workable rule for the businessman. It is something he fully and well understands.

MR. JUSTICE HARLAN: Well how much success do you need?

MR. MacCARTHY: That I think would depend a great deal on this particular Court. I definitely think in excess of $2 million of business in a period of approximately 15-½ months any businessman would agree was economic success within the State of Illinois.

I might make another point here. There were in-state c.o.d. deliveries. Again there seems to be some question raised in the reply brief as to the propriety of our mentioning c.o.d. [37] collections within the state. The record I think bears this out. The quote that counsel mentions, the quote in their reply brief at page 8 in footnote (3) they set out a quote wherein we suggest that c.o.d. collections were made. In setting forth our quote, by the way, that is a typographical or printing error. That is page 15 of our brief and not page 17. In setting out that quote, I think in fairness they might have set forth a footnote which immediately followed that quote. In the footnote we correctly, in accordance with the record, indicated that c.o.d. collections were not the practice in all cases. Unfortunately the record does not indicate in how many instances c.o.d. collections were made. However, the fact remains that c.o.d. collections were made in Illinois. In the same footnote they seem to take issue or object to our reference to the common carriers or the postal authorities as their representatives or as their bill collectors.

Now I think two particular statements by this Court might bear upon this, and again this goes to the substance over form argument which I would now make to the Court. Mr. Justice Douglas writing in the Harvester case indicated in a similar type of case that in these circumstances we are dealing with matters of substance and not with

matters of dialect, and, further, Mr. Justice Clark writing for the majority of The Court in the most recent Scripto case said to permit such formal contractual shipments to make a constitutional difference would [38] open the gates to a stampede of tax avoidance.

MR. JUSTICE HARLAN: Mr. MacCarthy, is there any way of estimating the potentialities of this tax as a revenue measure with the volume?

MR. MacCARTHY: What? The volume?

MR. JUSTICE HARLAN: What is your in-state use tax involved? How much revenue do you have?

MR. MacCARTHY: I do not know the exact answer to that, Your Honor, as to what percentage of total revenue this would mean to the state.

MR. JUSTICE HARLAN: It would be very much larger, I suppose.

MR. MacCARTHY: If I may deposit an answer to your question, Mr. Justice Harlan, the problem is not a question of revenue to the State of Illinois. Here is the problem. I think the defendant National Bellas Hess has somewhat ill-characterized its position in this Court. They are suggesting to The Court that they are a small specialty type mail order house, one who wants to eliminate discrimination, one who wants equality of tax treatment. I do not think that the record in this case, Your Honors, or more importantly this record, the state taxation report which they rely upon, bears this particular status out for them.

If I might point to this, they make a great todo about the fact that in most states collection has not or is not [39] made in circumstances such as this. In other words, most

states do not require an out-of-state vendor to make a collection of its use tax. They make a great todo about this fact. Now this is true. There is no question about this. We are willing to admit it. Only recently has Illinois enacted such a statute. But I do not think the fact that Illinois or other states have not collected this tax in the past bears one iota on the constitutional issue before this Court. However, and this would be the point I would make, the fact that recently states have this legislation does bear upon the policy considerations and does portray National in a little different light.

I might explain this. The record is also replete with references to the fact that most of the vendor states do not require collection of this tax. Appreciating this fact, it becomes rather obvious that National Bellas Hess or these mail order houses are now in a tax sanctuary situation. They are not paying any tax, and not paying any tax are permitted to discriminate in a way against the local buyers and also against the mail order houses who do pay the tax. This I think is an important point in understanding the policy and the reason for this tax. This tax is not intended to discriminate against out-of-state buyers. The purpose of this tax is to have everyone treated equally to permit the in-state seller the same margin of profit that the out-of-state seller would have.

[40] MR. JUSTICE WHITE: So you really think this may be a business regulation or device rather than a revenue base of measuring?

MR. MacCARTHY: If you are asking me, Mr. Justice White, do I think this particular will pass—

MR. JUSTICE WHITE: No. The Illinois law is really a business regulation.

MR. MacCARTHY: Oh definitely. I think it is intended to be so.

MR. JUSTICE WHITE: And not to raise revenue?

MR. MacCARTHY: Definitely not to raise revenue. The idea is to protect, if you will, not only the local merchants but the interstate merchants who are collecting and remitting the Illinois tax.

MR. JUSTICE WHITE: How far back do you intend to collect tax? How far back are you permitted to go? When will the statute run out?

MR. MacCARTHY: Well the statute was passed in 1961. The statute was passed July 1st 1961. The particular tax in question ran from July 17, 1961, to October 31, 1962.

MR. JUSTICE WHITE: But if you wanted to against Bellas Hess, how far back could you go?

MR. MacCARTHY: July 1st 1961.

MR. JUSTICE WHITE: If you could do this and collect the use tax from Bellas Hess whether they collect it from the [41] purchaser or not, why could you not apply a sales tax to these interstate sales made by Bellas Hess to buyers in Illinois?

MR. MacCARTHY: I think I understand your question. I think we are precluded from collecting a sales tax by this Court's decision in the McLeod case.

MR. JUSTICE WHITE: Why?

MR. MacCARTHY: The McLeod case indicated that the sale would have to be within the state and we have made no argument that the sales are within the state.

MR. JUSTICE WHITE: Why should it have to be within the state?

MR. MacCARTHY: This is The Court's decision.

MR. JUSTICE WHITE: I know it. But how do you understand it? Why is there a rule against collecting a sales tax?

MR. MacCARTHY: Well the late Mr. Justice Wiley Rutledge wrote a vigorous dissent, and if I could possibly paraphrase his dissent, He did not agree that in McLeod a tax should not be collected whether or not it was a sales or use tax.

MR. JUSTICE WHITE: You would say, yes, if you can do this, you should be able to collect a sales tax?

MR. MacCARTHY: I think we are more properly in our rights collecting a use tax and this is the reason we collect a use tax.

MR. JUSTICE WHITE: You think you are constitutionally forced to collect a use tax rather than a sales tax?

[42] MR. MacCARTHY: Yes, we do. I would like for a moment to turn in conclusion to the cases real briefly. National places tremendous reliance upon the Miller case. I think that this reliance is somewhat misplaced, and I think it is somewhat misplaced because National has failed to appreciate the particular facts in Miller. I would like to briefly mention some five distinctions in Miller which I think sufficiently distinguish Miller from this case.

First of all, National in its brief and now again in its oral argument refers to the regular deliveries in Miller. Conversely the Court in deciding Miller specifically referred to these deliveries as occasional deliveries.

Again, Mr. Justice Clark in writing the Scripto decision referring to Miller referred to "occasional deliveries in Miller."

Again, in its reply brief at page 3 National refers to the regular mailings in Miller. Conversely this Court in deciding Miller referred to the occasional sales circulars in Miller.

National fails to make a distinction which I think is quite salient to Miller, and that is in the Miller case the buyers left the State of Maryland, went into the State of Delaware and at the vendor's stores made the purchase. They do not particularly give any credence to this fact. However, the majority of The Court in writing Miller specifically noted [43] that the seller in the Miller case did not know where the goods were to be used.

Mr. Justice Douglas in writing a dissent felt otherwise and believed that the seller should have known where they were used. The fact remains whether or not he did or did not know was pertinent.

Thank you, Mr. Justices.

– END –

APPENDIX 2

NORTH DAKOTA

Obligations Imposed on North Dakota Vendors: Every vendor deemed to be a "retailer maintaining a place of business" in North Dakota is required to register under the North Dakota Sales and Use Tax Acts to obtain a permit to collect the use tax, subject to all conditions and fee requirements imposed on retailers with locations or representatives in the state otherwise subject to North Dakota's sales tax provisions. N.D. Cent. Code § 57-40.2-07. Specifically, the compliance obligations placed on out-of-state vendors include:

1. registering to obtain a sales and use tax permit and complying with all application procedures, including providing specific information regarding estimated monthly sales, names of owners/corporate officers, and detailed credit information;

2. posting a bond or other security to insure payment of taxes, if required by the tax commissioner;

3. maintenance of records (invoices, receipts and other pertinent documents) for a period of three years and three months for examination by the State;

4. making records, books and papers available for inspection in North Dakota;

5. determination of the extent and application of specific exemptions from the tax including: exemptions for sales for resale (retailer must obtain a certificate of resale from the purchaser at least once a year); exemptions for sales to specific exempt organizations; exemptions for new machinery and equipment, including computers (retailer must obtain certificate); and exemptions for certain food items;

6. timely and accurate collection and/or payment of both state and locally imposed taxes;

7. preparation and timely filing of the state tax return reporting all state and local taxes;

8. determination of refunds due customers for over-collected taxes;

9. filing of refund claims for overpaid taxes on behalf of any customer erroneously paying tax;

10. administration of the collection of taxes and filing of returns to avoid violation of penalty provisions for underpayment of tax and failure to pay or file rules, which can lead to personal liability of officers; and

11. keeping abreast of the continuing changes occurring under the North Dakota Sales and Use Tax Acts including changes in compliance provisions, exemption provisions and rate changes, whether issued through the legislature, judiciary or the administrative process.

N.D. Cent. Code § 57-39.2-15, *et seq.*; N.D. Cent. Code § 57-40.2-04, *et seq.*; North Dakota Application for Sales and Use Tax Permit.

Legislative Changes: The applicable sales and use rate and the rules for determining tax due in North Dakota have been the subject of frequent changes. In North Dakota, the applicable sales and use tax rate was modified three times between January, 1987 and December, 1989. N. Dakota State Tax Reporter (CCH) ¶60-401. Two bills proposed in the 1991 legislative session, HB 1386 and SB 2580, would have changed the rate again. In 1983 and 1985, SB 2497 and HB 1663 were enacted, respectively, providing for contingent 1% increases in the sales and use tax rate depending on the general fund balance at particular points in time. Ch. 632, SB 6497; Ch. 638, HB 1663. HB 1386, referenced above, would have also imposed a 1% contingent increase based on the level of funds.

A total of twenty-five (25) different bills affecting the use tax in North Dakota have been enacted since 1987. *See* North Dakota State Tax Reporter (CCH) ¶187-060 *et seq.* Since 1967, there have been sixty-nine (69) bills enacted affecting the use tax. In addition, the last three legislative sessions have seen twenty-two (22) bills related to the use tax proposed but not passed: 1987-8; 1989-7; and 1991-7.

Local Rates: There are currently twelve cities with local taxing authority imposing rates varying from ½% to 1%: Bismarck, Minot, Fargo, Grand Forks, Dickinson, Williston, Mandan, Grafton, Harvey, Wahpeton, Devils Lake and Jamestown. An additional local city tax for Valley City is set to be imposed as of January 1, 1992. *See* N. Dakota State Tax Reporter (CCH) ¶60-403.

Exemptions: Sales of the following are exempt from tax: items purchased by certain educational, government and charitable organizations, manufacturing equipment for new and expanding facilities (including computers), food and drugs, certain medicines, and farm and feed items. *See* N. Dakota Tax Reporter (CCH) ¶60-200 *et seq.* North Dakota also exempts sales of newsprint and ink (N.D. Cent. Code §57-40.2-04(6)) and newspapers and free magazines. *Id.* §57-39.2-01(9). Each of these exemptions has certain limitations. For example, there are variations within the North Dakota food exemption. The provision exempting food and food products includes a nonexclusive laundry list of items but specifically excludes from exempt food more than nine general types of "food." N.D. Cent. Code §57-39.2-04.1.

Refund Claims: In North Dakota, a retailer maintaining a place of business that has erroneously overcollected tax must pay all tax collected to the state. If the tax is subsequently refunded to the customer, the retailer may take a credit on the next return for the tax properly refunded. N.D. Cent. Code §57-40.2-17. It is the retailer's obligation to administratively handle all claims for refund of taxes overpaid by customers even if attributable to customer error or developments subsequent to the sale. Claims for refund are allowed for the person who made the erroneous payment, if filed before the later of (1) three years of the return due date or (2) one year after the amount is paid. *Id.* §57-39.2-24 (incorporated by reference at §57-40.2-13). If a refund claim is disallowed, the denial becomes final and irrevocable within 30 days after notice unless a written protest is filed. *Id.* §57-39.2-25 (incorporated by reference at §57-40.2-13).

APPENDIX 3

ALL STATES

State Tax Rate Variations: The tax rate differences as of September, 1991, categorized by rate are as follows:

3 Percent: Colorado and Wyoming; *3.5 Percent*: Virginia; *4 Percent*: Alabama, Georgia, Hawaii, Iowa, Louisiana, Michigan, New York, North Carolina and South Dakota; *4.225 Percent*: Missouri; *4.25 Percent*: Kansas; *4.5 Percent*: Arkansas and Oklahoma; *5 Percent*: Arizona, Idaho, Indiana, Maryland, Massachusetts, Nebraska, New Mexico, North Dakota, Ohio, South Carolina, Utah, Vermont and Wisconsin; *5.5 Percent*: Tennessee; *5.75 Percent*: Nevada; *6 Percent*: California, Connecticut, District of Columbia, Florida, Kentucky, Maine, Mississippi, Pennsylvania and West Virginia; *6.25 Percent*: Illinois and Texas; *6.5 Percent*: Minnesota and Washington; *7 Percent*: New Jersey and Rhode Island.

2 State Tax Guide (CCH) ¶60-100.

In addition, the following changes in the sales/use tax rates have been recently enacted:

1) California-decrease from 6% to 5.5% no later than July 1, 1993;
2) Maine-decrease from 6% to 5% on July 1, 1993;
3) Minnesota-decrease from 6.5% to 6% on January 1, 1992;
4) Missouri-additional 1.5% use tax on July 1, 1992; and
5) Nevada-increase from 5.75% to 6.5% on October 1, 1991.

2 State Tax Guide (CCH) ¶60-100.

Local Rates: At present there are thirteen different state sales and use tax rates and hundreds of local rates which vary by jurisdiction within each state. In the states where locally imposed taxes are collected by the state, vendors must still account separately for the following local taxes in their records and/or on their state tax returns: Alabama (counties-56, cities-240+); Alaska (boroughs-5, cities-94); Arizona (counties-9, cities-84); Arkansas (counties-56, cities-138); California (counties-58, cities-2,000+); Colorado (counties-39; cities-157); Florida (counties-25); Georgia (counties-148); Illinois (counties-8, cities-46, special districts-3); Iowa (counties-13); Kansas (counties and cities-200+); Minnesota (cities-2); Missouri (counties and cities-1400+); Nebraska (cities-45); Nevada (counties-7); New Mexico (counties-32, cities-104); New York (counties-61, cities-27); North Carolina (counties-76); North Dakota (cities-12); Ohio (counties-85); Oklahoma (counties-25, cities-480); Pennsylvania (cities-2); South Carolina (counties-6); South Dakota (cities-144); Tennessee (counties-95); Texas (counties-102, cities-1800+); Utah (counties-29); Virginia (all cities and counties); Washington (counties-38); Wisconsin (counties-40); and Wyoming (counties-17). Several states have local jurisdictions which separately administer and collect local taxes: Alabama (counties-5, municipalities-41); Alaska (cities-12); Arizona (cities-12); Colorado (cities-42); Louisiana (parishes and cities-240+); and Minnesota (city-1). *See* 2 State Tax Guide (CCH) ¶60-200 *et seq.*

Exemptions: Many states provide exemptions for: manufacturing machinery and equipment (some apply reduced rate); computer hardware; materials/packaging used in certain functions or processes; pollution control equipment; and agricultural or farm related equipment. *See* 2 Multistate Corporate Tax Guide (Panel) 178-220.

Twenty-six states provide an exemption for the sale of food: Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, Texas, Vermont, Washington, and Wisconsin; five states exempt food sales only if purchased with federally-funded food stamps: Arizona, District of Columbia, Iowa, Kentucky and Nebraska; and six states exclude candy or gum from the definition of food: Indiana, Minnesota, New Jersey New York, Texas and North Dakota. 2 State Tax Guide (CCH) ¶60-110.

Return Filing Requirements: Thirty-nine states require monthly returns: Alabama, Arizona, Arkansas, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota (depending on sales level), Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota (Bi-Monthly), Tennessee, Texas, Vermont, Virginia, Washington, West Virginia and Wyoming.

Eight states require quarterly returns: California, Iowa, Missouri, New York, North Dakota, Pennsylvania, Utah and Wisconsin. All States Tax Guide (P-H) ¶250.

Refund Claims: Several states require the retailer (as opposed to the customer) to file refund claims: Alabama (joint customer/retailer petition allowed; Ala. Admin. Code r. 810-6-4-.16), Florida (Fla. Admin. Code r. 12A-1.014), Missouri (Mo. Code Regs. tit. 12, §10-4.255), and Texas (Tex. Admin. Code, tit. 34, §3.325). Kansas, Ohio and South Dakota require retailer claims unless the customer has

paid the tax directly to the state. Kan. Admin. Regs. 92-19-49: Ohio Admin. Code §5703-9-07; and South Dakota Rev. Info. Bull. re: Retailer refund claims.

Bond/Security and Service of Process: In thirty-six states the tax commissioner may require a retailer to post a bond or security when registering with the state to collect sales and use taxes: Ala. Code §40-23-24 (1990); Ariz. Rev. Stat. Ann. §42-1305.01 (1991); Ark Reg. GR-88; Cal. Rev. & Tax Code §6701 (West 1987); Conn. Gen. Stat. §12-430 (1983); Fla. Stat. Ann. §212.14(4) (West 1987); Idaho Code §63-3625 (1989); Ill. Ann. Stat. ch.120, ¶441a (Smith-Hurd 1991); Indiana Code §6-2.5-8-1 (1989); Iowa Code §422.30 (1990); Kan. Stat. Ann. §79-3616 (1989); Ky. Rev. Stat. Ann. §139.660 (Michie/Bobbs-Merrill 1991); Me. Rev. Stat. Ann., tit. 36 §1759; Md. Tax-Gen. Code Ann. §13-824(g) (1988); Mass. Regs. Code tit. 80, §62C.66.1 (1988); Mich. Comp. Laws §205.53 (1986); Minn. Stat. §297A.28 (1991); Miss. Code Ann. §27-65-27 (1990); Mo. Rev. Stat. §144.087 (Supp. 1991); Neb. Rev. Stat. §144.087 (Supp. 1991); Nev. Rev. Stat. §372.510 (1986); N.J. Rev. Stat. §54:32B-18 (1986); N.Y. Tax Law §1137(e) (McKinney 1987); N.C. Reg. 46; N.D. Cent. Code §57-40.2-07 (1987); Okla. Stat. tit. 68, §1368 (1986); Pa. Stat. Ann. tit. 72, §7277 (1990); R.I. Gen. Laws §44-19-23 (1990); S.D. Cod. Laws Ann. §10-46-24 (1989); Tenn. Code Ann. §67-6-522 (1989); Tex. Tax Code Ann. §151.251 (West 1982); Utah Code Ann. §59-12-107 (1990); Vt. Stat. Ann. tit. 32, §9776 (1981); Va. Code Ann. §58.1-630 (Michie 1991); W.Va. Code §11-15A-12 (1989); and Wis. Stat. §77.61 (1989).

Seven states require the out-of-state vendor to appoint the Secretary of State as agent for service of process for sales/use tax purposes: Ga. Code Ann. §48-8-65 (Michie 1982); Ill. Ann. Stat. ch. 120, ¶444i (Smith-Hurd 1991);

Nev. Rev. Stat. §372.540 (1986); Ohio Rev. Code Ann. § 5739.131 (Anderson 1986); Pa. Stat. Ann. tit 72, § 7245 (1990); R.I. Gen. Laws § 44-19-34 (1990); and Tex. Tax Code Ann. §151.606 (West 1982).

Self-Assessment of Tax By Purchasers: Nine states utilize a mechanism for collecting use tax from purchasers by providing a separate line item on the individual income tax return filed by residents (references to 1990 tax forms): Idaho (Form 40, line 44), Indiana (Form IT-40, line 18), Kentucky (Form 740, line 23), Maine (Form 1040ME, line 19), New Jersey (Form NJ-1040, line 28), Utah (Form TC-40, line 19), Vermont (Form 103, line 9), West Virginia (Form IT-140, line 8), and Wisconsin (Form 1, line 17). Nine states, including North Dakota, provide a separate self-assessment return, often specifically referenced in the instructions to the individual income tax return: Illinois (Form ST-44), Michigan (Form C-3001), Minnesota (Form UT-1), Nevada (Form DOT-ST-19), North Carolina (Form E-554), North Dakota (F22, North Dakota Use Tax Return), South Dakota (Form TF-125, Use Tax Form and Booklet), Virginia (Form ST-7), and Washington (Form REV 83.2501). Although California does not provide a separate form, specific reporting instructions are provided in the instructions to Forms 540A and 540, the individual income tax returns.

Anti-Bellas Hess Legislation: In addition to North Dakota, the following states have enacted anti-*Bellas Hess* legislation: **Alabama:** Ala. Code §§40-23-1 (Supp. 1990) (eff. 4-30-86) and 40-23-68 (eff. 9-01-91); **Arizona:** Ariz. Rev. Stat. Ann. §42-1401 (1991) (eff. 9-15-89); **Arkansas:** Ark. Code Ann. §§26-53-102 and 26-53-121 (Mich. 1987) (eff.

2-11-87); **California**: Cal. Rev. & Tax. Code §6203 (West Supp. 1991) (eff. 1-01-88, rev. 3-88); **Colorado**: Colo. Rev. Stat. §§39-26-102 (Supp. 1990) and 39-26-301 *et seq.* (Supp. 1990) (becomes effective when authorized by federal legislation); **Connecticut**: Conn. Gen. Stat. §12-407 (West Supp. 1991) (eff. 7-01-89, rev. 10-89); **Florida**: Fla. Stat. §§212.0596 and 212.05 (1987) (eff. 10-01-87); **Georgia**: Ga. Code Ann. §48-8-2(3)(H) (Supp. 1991) (eff. 7-01-90); **Idaho**: Idaho Code §63-3611 (1989) (eff. 7-01-89); **Illinois**: Ill. Ann. Stat. ch. 120, ¶439.2 (Smith-Hurd 1991) (eff. 1-01-90; **Iowa**: Iowa Code Ann. §422.43(12) (West 1990) (eff. 7-01-88); **Kansas**: Kan. Stat. Ann. §79-3702 (1989) (eff. 7-01-90); **Kentucky**: Ky. Rev. Stat. Ann. §139.340 (Michie/Bobbs-Merrill 1991) (eff. 7-15-88); **Louisiana**: La. Rev. Stat. Ann. §§47:301(4)(l) (West Supp. 1991) (eff. 10-90) and 47:305(E) (West Supp. 1991) (effective when authorized by federal legislation); **Massachusetts**: Mass. Gen. Laws Ann. ch. 64H, §1 (1991), Tech. Info. Release 88-13 (1988) (holds application until authorized by federal legislation); **Minnesota**: Minn. Stat. §297A.21 (West Supp. 1991) (eff. 6-01-88); **Mississippi**: Miss. Code Ann. §§27-67-3 and 27-67-4 (1990) (eff. 7-01-88); **Missouri**: Mo. Rev. Stat. §§144.605(2) and (14) (West Supp. 1991) (eff. 10-01-90); **Nebraska**: Neb. Rev. Stat. §77-2702(21) (1990) (eff. 10-01-87); **Nevada**: Nev. Rev. Stat. §372.728 (Supp. 1989) (eff. 10-01-89); **New Mexico**: N.M. Stat. Ann. §7-9-10 (1990) (eff. 7-01-90), N.M.G.R. Tax Reg. 3(E):4 (eff. 7-01-91); **New York**: N.Y. Tax Law §1101(b)(8) (McKinney 1987 and West Supp. 1991) (eff. 9-01-89); **North Carolina**: N.C. Gen. Stats. §§105-164.3 and 105.164.8 (1989) (eff. 1-01-89); **Ohio**: Ohio Rev. Code Ann. §5741.01(H) (Supp. 1990) (eff. 10-05-87); **Oklahoma**: Okla. Stat. Ann. tit. 68, §§1354.3 and 1354.5 (West Supp. 1991) (eff. 7-01-86, rev. 6-87); **Rhode Island**: R.I. Gen. Laws §44-18-23 (Supp. 1990) (eff. 9-01-90); **South Carolina**:

S.C. Code Ann. §§12-35-95 and 12-36-80 and 12-36-70 (Law. Co-op. Supp. 1990) (eff. 6-22-87); **South Dakota**: S.D. Cod. Laws Ann. §§10-46-1 and 10-46-18.3 (1989) (eff. 7-01-87); **Tennessee**: Tenn. Code Ann. §17-6-102(6) (1989) (eff. 1-01-89); **Texas**: Tex. Tax Code Ann. §151.107 (West Supp. 1991) (eff. 7-22-87, rev. 10-01-87); **Utah**: Utah Code Ann. §59-12-107(1) (West Supp. 1991) (eff. 7-01-90); **Vermont**: Vt. Stat. Ann. tit. 32, §9701(9) (1981 and Supp. 1990) (eff. 7-01-90); **Virginia**: Va. Code Ann. §58.1-612(c) (Michie 1991) (eff. 1991); **Washington**: Wash. Rev. Code Ann. §82.12.040(1) (West Supp. 1991), Wash. Admin. Code R. 458-20-221 (eff. 4-89 by regulation); and **West Virginia**: W.Va. Code §11-15A-6a (Supp. 1991) (eff. 7-01-89).

APPENDIX 4

National Meat Ass'n. v. Deukmejian, 743 F.2d 656, 658 n.1 (9th Cir. 1984), *aff'd*, 469 U.S. 1100 (1985) (reviewing nexus required for taxation of interstate commerce and noting lack of physical presence in *Bellas Hess*); *Aldens Inc. v. LaFollette*, 552 F.2d 745, 752-53 (7th Cir. 1977) (recognizing *Bellas Hess* as establishing the commerce and due process clause standards for taxing interstate vendors); *Aldens Inc. v. Packel*, 524 F.2d 38, 43 (3rd Cir. 1975), *cert. denied*, 425 U.S. 943 (1976) (citing *Bellas Hess* for the due process standard applied in tax cases); *Direct Marketing Association v. Bennett*, No. Civ. S-88-1067 (E.D. Cal. 1991) (1991 U.S. Dist. LEXIS 10736) (prohibiting California from imposing use tax collection obligations on mail order vendors whose only connection with the state is solicitation of sales and acceptance of credit cards issued by California financial institutions); *Evanston Ins. Co. v. Merin*, 598 F.Supp. 1290, 1305 (D.N.J. 1984) (focusing on *Bellas Hess* as the "leading case defining the minimal connection required" before a state can impose tax liability); *Strescon Industries, Inc. v. Cohen*, 508 F.Supp. 786, 788-89 (D. Md. 1981), *aff'd*, 664 F.2d 929 (4th Cir. 1981) (recognizing *Bellas Hess* as the standard which would apply to determine constitutional nexus); *Aldens, Inc. v. Miller*, 466 F.Supp. 379, 382-83 (S.D. Iowa 1979), *aff'd* 610 F.2d 538 (8th Cir.), *cert. denied*, 446 U.S. 919 (1980) (due process nexus standard of *Bellas Hess* applies to tax cases); *Confederated Tribes of the Colville Indian Reservation v. State of Washington*, 446 F.Supp. 1339, 1357 (E.D. Wash. 1978), *rev'd in part*, 447 U.S. 134 (1980) (under *Bellas Hess*, commerce clause test is satisfied if "some definite link" or "minimum connection" with the taxing jurisdiction); *Boswell v. Paramount Television Sales, Inc.*, 282

So.2d 892, 897 (Ala. 1973) (recognizing that *Bellas Hess* requires physical presence); *White v. Kimberly-Clark Corporation*, 503 So.2d 296, 301 (Ala. Cir. App. 1986), *aff'd* 503 So.2d 304 (Ala. 1987) (quoting *Wisconsin v. J.C. Penny Co.* as cited in *Bellas Hess* for the due process standard established by these cases); *Illinois Commercial Men's Ass'n v. State Bd. of Equal.*, 671 P.2d 349, 355 (Cal. 1983), *app. dism'd*, 466 U.S. 933 (1984) (distinguishing *Bellas Hess* because presence of agents in state in this case formed "minimum connection" required to justify imposition of tax); *Montgomery Ward & Co. v. State Board of Equal.*, 78 Cal. Rptr. 373, 381 (Cal. Ct. App. 1969), *cert. denied*, 396 U.S. 1040 (1970) (analyzing *Bellas Hess* and the constitutional principles addressed therein); *Associated Dry Goods v. City of Arvada*, 593 P.2d 1375, 1377 n.2 (Colo. 1979) (recognizing that delivery by mail or common carrier is insufficient nexus connection for taxation); *SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666, 670 (Conn.), *cert. denied*, 111 S. Ct. 2839 (1991) (holding nexus requirement of *Bellas Hess* not satisfied where mail order company mailed catalogs, provided toll-free "800" number and used magazine advertising to solicit sales from in-state customers); *Cally Curtis Co. v. Groppo*, 572 A.2d 302, 305 (Conn.), *cert. denied*, 111 S. Ct. 77 (1990) (following *Bellas Hess* in finding company not taxable based on leased films in the state); *Reader's Digest Ass'n v. Mahin*, 255 N.E.2d 458, 460 (Ill. App.), *cert. denied*, 399 U.S. 919 (1970) (finding nexus based on resident solicitors and local advertising); *Good's Furniture House, Inc. v. Iowa State Board of Tax Review*, 382 N.W.2d 145, 149-50 (Iowa), *cert. denied*, 479 U.S. 817 (1986) (finding nexus test as refined by *Bellas Hess* and *National Geographic* satisfied by in-state activities); *Sabine Pipe and Supply Company v. MacNamara*, 411 So.2d 1167, 1169 (La. App. 1982) (rec-

ognizing state cannot compel out-of-state seller to collect use taxes under *Bellas Hess* although taxes collected voluntarily must be paid over to state); *Burke & Sons Oil Co. v. Director of Revenue*, 757 S.W.2d 278, 280 (Mo. App. 1988) (stating that *Bellas Hess* establishes that "communicating with customers in a state by mail or common carrier as part of a general interstate business does not create a sufficient nexus"); *Alaska Airlines, Inc. v. Dept. of Revenue*, 769 P.2d 193, 198 (Or. 1989), *cert. denied*, 110 S. Ct. 717 (1990) (noting that *Bellas Hess* provides the standard by which nexus is judged); *Bloomingdale's By Mail, Ltd. v. Commonwealth of Pennsylvania*, 567 A.2d 773, 777 (Pa. Commw. 1989), *aff'd per curiam*, 591 A.2d 1047 (Pa. 1991), *cert. applied for sub nom. Penn. v. Bloomingdale's By Mail, Ltd.*, No. 91-383 (applying commerce clause and due process clause standards of *Bellas Hess* in analyzing whether mail order vendors had sufficient nexus with state); *Fingerhut Corporation v. Commonwealth Pennsylvania*, 275 F&R 1990, 1990 Pa. Tax LEXIS 1048 (Pa. Commw. 1990) (holding out-of-state vendor conducting business by mail, telephone and common carrier not liable under holdings of *Bellas Hess* as well as other U.S. Supreme Court and Pennsylvania court decisions); *L.L. Bean, Inc. v. Commonwealth of Pennsylvania*, 516 A.2d 820 (Pa. Commw. 1986) (holding insufficient nexus between mail order company and state based on *Bellas Hess* and *Miller Bros.*); *Pearle Health Services, Inc. v. Taylor*, 799 S.W.2d 655, 658 (Tenn. 1990) (citing *Bellas Hess* as the standard for constitutional limits on taxing companies whose only contact is by mail and common carrier); *Rowe-Genereux, Inc. v. Vermont*, 411 A.2d 1345, 1348 (Vt. 1980) (citing *Bellas Hess* in analyzing long line of tax nexus standard cases). *See also Land's End, Inc. v. California State Board of Equalization*, No. 620135 (San Diego Superior Court, Cal. 1991), *appeal docketed*, No. D014839 (Cal. App. 4th July 15, 1991) and *Sturbridge Yankee Workshop, Inc. v. State Board of Equalization*, No. 512584 (Sacramento Superior Court, Cal. 1991), *appeal docketed*, No. C011169 (Cal. App. 3d May 30, 1991) (holding out-of-state mail order vendors not liable for collection of California use taxes on facts substantially similar to *Bellas Hess*).